Professor Dato' Dr Mohd Fauzi bin Ramlan v Universiti Putra Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-375–07 OF 2021
NANTHA BALAN, MOHD NAZLAN AND CHOO KAH SING JJCA
29 AUGUST 2025

Administrative Law — Disciplinary proceedings — Procedural fairness — Right to be heard — Appellant appealed against High Court's decision in dismissing appellant's judicial review application seeking to overturn Disciplinary Appeal Committee's rejection of his appeal against Disciplinary Committee's finding of misconduct — Whether any alleged deficiencies in procedural fairness at initial stage of disciplinary inquiry may be retrospectively cured by subsequent appellate hearing

The appellant was a professor and former Vice-Chancellor of the first respondent ie Universiti Putra Malaysia ('UPM'). On or about 28 April 2014, the appellant had, in his capacity as the then Vice-Chancellor, signed and/or executed on behalf of UPM two agreements without obtaining the prior approval of UPM's Board of Directors ('the Board'). The Board then directed the Internal Audit Department to conduct an audit on the agreements and established the Internal Investigation Committee ('IIC') to investigate and collate information. Upon evaluation, the Board agreed that the appellant should be subject to disciplinary proceedings in accordance with the Statutory Bodies (Discipline and Surcharge) Act 2000 ('the Act'). The IIC interviewed several persons, including the appellant and in particular, UPM's then legal advisor. The findings of the IIC were reported to the Board. The Board was satisfied that disciplinary proceedings were warranted and referred the matter to the Disciplinary Committee ('DC'). The DC directed the Investigation Committee ('IC') to investigate the matter. The IC conducted an investigation but it was done without anyone being interviewed. The DC adopted the outcome of the IC's investigation and made the decision that the appellant's conduct of signing the agreements without prior approval of the Board, was an act of insubordination or conduct which could be reasonably construed as being insubordinate in the discharge of duty. The appellant appealed against the decision to the second respondent ie UPM's Disciplinary Appeal Committee ('DAC'). The DAC conducted a hearing and thereafter confirmed the DC's decision. The appellant then filed a judicial review application to, inter alia, quash the decision of the DAC. The crux of the appellant's complaint was that the evidence of the other witnesses was not taken in his presence, and that he was in the dark as to what each of the witnesses had said to the DAC. The High Court dismissed the appellant's application and hence, this appeal.

The appellant argued that he was not given an opportunity to be present when evidence was taken in respect of the charges levelled against him and/or to cross-examine the witnesses during the IIC hearing, the IC hearing and/or the hearing before the DAC, and that this thereby infringed the rules of natural justice.

Held, allowing the appeal:

(1) A key principle laid out in *Calvin v Carr and others* [1979] 2 All ER 440 was that procedural defects in an initial inquiry could be 'cured' by a subsequent appellate process. Thus, if an internal/domestic appeal was fairly and properly conducted, then that appeal could possibly cure the initial procedural defect. Even if there may have been defects in any of the stages of the disciplinary process, IIC, IC, DC, ultimately it was the procedure and proceedings before the DAC that really matters. The DAC proceedings, provided that it was conducted in accordance with the rules of natural justice would or may have the effect of curing any earlier defect in the disciplinary process. However, the same defective procedure was also adopted by the DAC where the evidence before the DAC was taken without the presence of the appellant. Hence, he had no opportunity of clarifying, or if necessary, to rebut or contradict the evidence of any of the witnesses (see paras 63 & 66–67).

(2) It mattered not that the appellant had not requested to be present when others were testifying, or to cross-examine these other witnesses. In order to exculpate himself, the appellant had a right to be present when others testified before the DAC and if necessary, to cross-examine or at the very least to offer a rebuttal or to contradict what others had to say. The DAC, being 'the master of their own procedure', were duty bound to ensure that the proceedings were conducted fairly. Hence, the DAC should have asked the appellant to remain in the hearing room after he had testified so that he could listen to what the others had to say, and if he so desired, to give him a chance to clarify, rebut or contradict the evidence assuming it was adverse to him (see paras 93–96).

[Bahasa Malaysia summary

Perayu merupakan seorang profesor dan bekas Naib Canselor responden pertama, iaitu Universiti Putra Malaysia ('UPM'). Pada atau sekitar 28 April 2014, perayu, dalam kapasitinya sebagai Naib Canselor pada masa itu, telah menandatangani dan/atau melaksanakan bagi pihak UPM dua perjanjian tanpa mendapatkan kelulusan terlebih dahulu daripada Lembaga Pengarah UPM ('Lembaga'). Lembaga kemudiannya mengarahkan Jabatan Audit Dalaman untuk menjalankan audit ke atas perjanjian-perjanjian tersebut dan menubuhkan Jawatankuasa Siasatan Dalaman ('JSD') untuk menyiasat dan mengumpul maklumat. Selepas penilaian, Lembaga bersetuju bahawa perayu patut dikenakan tindakan disiplin selaras dengan Akta Badan-Badan Berkanun

(Tatatertib dan Surcaj) 2000 ('Akta'). JSD menemu bual beberapa orang, termasuk perayu dan khususnya, penasihat undang-undang UPM pada masa itu. Penemuan JSD dilaporkan kepada Lembaga. Lembaga berpuas hati bahawa tindakan disiplin wajar diambil dan merujuk perkara itu kepada Jawatankuasa Tatatertib ('JT'). JT mengarahkan Jawatankuasa Penyiasat ('JP') untuk menyiasat perkara itu. JP menjalankan siasatan tetapi ia dilakukan tanpa sesiapa pun ditemu bual. JT menerima pakai hasil siasatan JP dan membuat keputusan bahawa tindakan perayu menandatangani perjanjian-perjanjian tanpa kelulusan terlebih dahulu daripada Lembaga, adalah satu tindakan ingkar atau kelakuan yang boleh ditafsirkan secara munasabah sebagai ingkar dalam melaksanakan tugas. Perayu merayu terhadap keputusan tersebut kepada responden kedua, iaitu Jawatankuasa Rayuan Tatatertib UPM ('JRT'). JRT menjalankan pendengaran dan seterusnya mengesahkan keputusan JT. Perayu kemudiannya memfailkan permohonan semakan kehakiman untuk, antara lain, membatalkan keputusan JRT. Inti aduan perayu adalah bahawa keterangan saksi-saksi lain tidak diambil di hadapannya, dan beliau tidak mengetahui apa yang dikatakan oleh setiap saksi kepada JRT. Mahkamah Tinggi menolak permohonan perayu dan oleh itu, rayuan ini. Perayu berhujah bahawa beliau tidak diberi peluang untuk hadir apabila keterangan telah diambil berkenaan dengan pertuduhan yang dilemparkan terhadapnya dan/atau untuk menyoal balas saksi-saksi semasa pendengaran JSD, pendengaran JP dan/atau pendengaran di hadapan JRT, dan ini dengan itu melanggar peraturan keadilan semula jadi.

Diputuskan, membenarkan rayuan:

(1) Prinsip utama yang digariskan dalam *Calvin v Carr and others* [1979] 2 All ER 440 adalah bahawa kecacatan prosedur dalam siasatan awal boleh 'dipulihkan' oleh proses rayuan berikutnya. Oleh itu, jika rayuan dalaman/domestik dijalankan dengan adil dan betul, maka rayuan itu mungkin boleh memulihkan kecacatan prosedur awal. Walaupun mungkin terdapat kecacatan dalam mana-mana peringkat proses tatatertib, JSD, JP, JT, akhirnya prosedur dan prosiding di hadapan JRT yang benar-benar penting. Prosiding JRT, dengan syarat ia dijalankan selaras dengan kaedah keadilan semula jadi akan atau mungkin mempunyai kesan memulihkan sebarang kecacatan terdahulu dalam proses tatatertib. Walau bagaimanapun, prosedur yang sama cacat turut diterima pakai oleh JRT di mana keterangan di hadapan JRT diambil tanpa kehadiran perayu. Oleh itu, beliau tidak mempunyai peluang untuk menjelaskan, atau jika perlu, untuk membantah atau menyanggah keterangan mana-mana saksi (lihat perenggan 63 & 66–67).

(2) Tidak menjadi persoalan bahawa perayu tidak meminta untuk hadir semasa orang lain memberi keterangan, atau untuk menyoal balas saksi-saksi lain ini. Untuk membersihkan dirinya, perayu mempunyai hak untuk hadir apabila orang lain memberi keterangan di hadapan JRT

dan jika perlu, untuk menyoal balas atau sekurang-kurangnya untuk menawarkan penyangkalan atau untuk menyanggah apa yang orang lain katakan. JRT, sebagai 'penguasa prosedur mereka sendiri', terikat untuk memastikan prosiding dijalankan dengan adil. Oleh itu, JRT sepatutnya meminta perayu untuk kekal di dalam bilik pendengaran selepas beliau memberi keterangan supaya beliau boleh mendengar apa yang orang lain katakan, dan jika beliau berhasrat demikian, untuk memberi beliau peluang untuk menjelaskan, membantah atau menyanggah keterangan itu dengan anggapan ia memudaratkannya (lihat perenggan 93–96).]

Cases referred to

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)

Byrne and Another v Kinematograph Renters Society Ltd and Others [1958] 2 All ER 579, Ch D (refd)

Calvin v Carr and others [1979] 2 All ER 440; [1980] AC 574, PC (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, HL (refd)

Fernando v The University of Ceylon [1956] NLR 265, SC (folld)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114, SC (refd)

John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John [1969] 2 All ER 274, Ch D (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2010] 2 AMR 231, FC (refd)

Lembaga Jurutera Malaysia v Leong Pui Kun [2009] 2 MLJ 36, FC (refd)

Mayes v Mayes [1971] 1 WLR 679 (folld)

Mohamad Adri' Ammar bin Mohamad v Suruhanjaya Pasukan Polis & Anor [2022] MLJU 351, HC (refd)

Mohamad Adri' Ammar bin Mohamad v Suruhanjaya Pasukan Polis & Anor [2023] MLJU 2405, CA (refd)

Najar Singh v Government of Malaysia & Anor [1976] 1 MLJ 203, PC (refd)

Professor Dato' Dr Mohd Fauzi bin Ramlan v University Putra Malaysia & Ors [2021] MLJU 2761; [2021] CLJU 2404, HC (refd)

R v Sussex Justices, ex parte McCarthy [1923] All ER Rep 233; [1924] 1 KB 256, KBD (refd)

Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487, HC (refd)

Tan Boon Chee, David v Medical Council of Singapore [1980] 2 MLJ 116 (refd)

Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor [1987] 1 MLJ 124, SC (refd)

University of Ceylon v EFW Fernando [1960] 1 WLR 223; [1960] 1 All ER 631, PC (refd)

Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor [2011] 5 MLJ 465; [2012] 1 CLJ 448; [2011] 5 AMR 688, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, para 1
Federal Constitution arts 5(1), 8(1), 135, 135(1), (2), 160(2)
Statutory Bodies (Discipline and Surcharge) Act 2000 Second Schedule, regs 32(1), 35(2)(b), 40(a), (f), Part V, Third Schedule, regs 21, 21(2), (3), 22, 22(1)(b), 23

Appeal from: *Professor Dato' Dr Mohd Fauzi bin Ramlan v University Putra Malaysia & Ors* [2021] MLJU 2761 (High Court, Kuala Lumpur)

Gunaseelan Tambinathan (with John Skelchy and Shirlena Yogeswaran) (R Kumaradevan) (James Monteiro) for the appellant.
Kok Su Ann (with Isabella Cheah Chooi Mun and Nur Liyana Nor Azman) (Zain & Co) for the respondents.

Nantha Balan JCA:

THE APPEAL

[1] This appeal emanates from disciplinary proceedings which were instituted by the first respondent ('R1')/Universiti Putra Malaysia ('UPM') against Professor Dato' Dr Mohd Fauzi bin Ramlan ('the appellant') (a former Vice-Chancellor of UPM). The disciplinary proceedings against the appellant were regulated by the provisions of the Statutory Bodies (Discipline and Surcharge) Act 2000 (Act 605) ('the Act'). The second respondent is UPM's Disciplinary Appeal Committee ('DAC') and is a creature of the Act. In this judgment, the first respondent shall interchangeably be referred to as 'R1' or 'UPM'. The present appeal is against the decision of the learned judge of the High Court at Kuala Lumpur, dated 11 June 2021, dismissing the appellant's application for judicial review to quash the decision of the DAC, dated 23 July 2019, which rejected the appellant's appeal against the decision of the Disciplinary Committee ('DC') which found him guilty of the charge of misconduct ie insubordination, and punished with reduction of rank from Grade VK6 to VK7.

[2] The third respondent who was at that time the Minister of Education, had chaired the DAC meeting on 28 June 2019. Before the DC had commenced, the Board of the first respondent had formed a committee known as the Internal Investigation Committee ('IIC') and directed that an investigation be conducted into the issues pertaining to the appellant's misconduct.

[3] The IIC interviewed several persons, including the appellant and in particular, UPM's then Legal Advisor, Prof Madya Dr Rozanah bt Abdul Rahman ('Dr Rozanah'), who also testified subsequently before the DAC. The

findings of the IIC were reported to the Board. The Board was satisfied that disciplinary proceedings were warranted and referred the matter to the DC. The DC directed the Investigation Committee ('IC') to investigate the matter. The IC conducted an investigation. However, the IC's investigation was done without anyone being interviewed. The DC adopted the outcome of the IC's investigation and found the appellant guilty of misconduct and downgraded him from UK6 to VK7. The High Court's decision which dismissed the judicial review is reported as *Professor Dato' Dr Mohd Fauzi bin Ramlan v University Putra Malaysia & Ors* [2021] MLJU 2761; [2021] CLJU 2404 (HC).

BACKGROUND FACTS

[4] The appellant was a Professor in the Faculty of Agriculture of R1. He was also the former Vice-Chancellor of UPM from 1 January 2013 to 31 December 2015. The facts giving rise to the disciplinary complaint are said to have arisen whilst he was the Vice-Chancellor of UPM. At any rate, as a result of the disciplinary proceedings, the appellant was punished with reduction in rank from Grade VK6 to VK7.

[5] During his tenure as the Vice-Chancellor of UPM, he was also the member of UPM's Board, the Chairman of the Senate and the Chairman of the Management Committee ('MC'). As the Vice-Chancellor, the appellant was involved in the following two projects:

(a) a project to construct and develop a facility known 'Medical City' on land owned by UPM, which includes a private hospital, international school, retail facility, international residence, hotel, office, health centre and exhibition hall ('Medical City Project'); and

(b) a project to construct and develop a futsal court and sports facility on land owned by UPM ('futsal project'), (collectively referred to as 'the Projects').

[6] The gravamen of the disciplinary complaint is that on or about 28 April 2014, the appellant had, in his capacity as the then Vice-Chancellor, signed and/or executed on behalf of UPM the following agreements (*without obtaining the Board's prior approval*):

(a) agreement between UPM and Freestyle Development Sdn Bhd ('Freestyle') dated 28 April 2014 for the purpose of the development of the Medical City Project ('Medical City agreement'); and

(b) agreement between UPM and Majmasyhur Holdings Sdn Bhd ('Majmasyhur') dated 28 April 2014 for the purpose of constructing, developing, managing and operating a futsal court complex on a piece of

land owned by UPM ('futsal agreement'), (both agreements collectively referred to as 'the agreements').

[7] The agreements were later presented by the appellant to UPM's Board of Directors ('the Board') at its 109th meeting held on 15 December 2015 ('109th Meeting'). The Board noted that although the Medical City agreement appeared to have been entered for the purpose of generating profit for UPM, the said agreement was executed without complying with the proper processes and legal aspects in force, and was in any event in breach of the Board's resolutions. The appellant was immediately 'reprimanded' by the Board for signing the Medical City agreement without first obtaining the approval of the Board. It is not without significance that the Board also reprimanded Dr Rozanah for not protecting UPM's legal interests.

[8] The Board then directed the Internal Audit Department to conduct an audit on the said agreements and two other procurement cases to review the documents in those cases and determine whether or not they were done in compliance with the rules and resolutions of UPM at the material time; and also established the IIC to investigate and collate information regarding the implementation of the Medical City Project, the Futsal Project and two other procurement cases.

[9] Upon evaluating the findings of the Internal Audit Department and the IIC, the Board in its 111th meeting on 8 December 2016, agreed that the appellant should be subject to disciplinary proceedings in accordance with the Act. The disciplinary process involves the following process. The impugned officer will first be brought before the DC which will consider, inter alia, whether there exists a prima facie case against the impugned officer; whether the officer's written representations are sufficient to exculpate himself and if not, consider and decide the punishment to be imposed on the officer. If necessary, the DC may refer the matter to the IC which is to investigate and report to the DC. The DC will then decide on culpability and punishment accordingly. In the event that the DC finds the officer guilty of the disciplinary offence and imposes a punishment against the officer, the officer shall be entitled to appeal against the said decision to the DAC. The DAC shall consider the appeal and make its decision pursuant to reg 22, Third Schedule of the Act.

[10] The chronology of the disciplinary proceedings against the appellant was as follows. On 5 September 2018, the DC made the decision that the appellant's conduct of signing the agreements without prior approval of the Board, was an act of insubordination or conduct which could be reasonably construed as being insubordinate in the discharge of duty ('DC decision'). Consequently, the following punishments were imposed on the appellant:

(a) in respect of the Medical City agreement, a reduction in rank from VK6 to VK7 in accordance with reg 40(f), Second Schedule of the Act; and

(b) in respect of the futsal agreement, a warning in accordance with reg 40(a), Second Schedule of the Act.

[11] The appellant appealed against the above decision to the DAC, and on 28 June 2019, the DAC conducted a hearing and thereafter confirmed the DC decision in accordance with reg 22(1)(b), Third Schedule of the Act.

[12] The facts surrounding the appellant's allegation vis a vis the DAC are as follows:

(a) the DAC convened for the first time on 8 February 2019, and upon considering the issues raised by the appellant in his letter of appeal dated [*sic*] October 2018 ('letter of appeal'), inter alia, that he was not given the right to be heard and was not able to put forward his defence, the DAC decided to adjourn the meeting to another date whereupon the appellant and other related witnesses would be called to give oral evidence and/or explanation, prior to making its decision;

(b) on 28 June 2019, the DAC convened for the second time. The DAC heard evidence from the appellant, and other witnesses;

(c) the DAC then considered the appellant's oral evidence wherein he denied that he was insubordinate and maintained the following:

(i) that he was subordinate to the Board and was authorised to sign agreements on behalf of the Board;

(ii) that there was non-compliance of procedure when the IIC was formed and which pre-empted the DC;

(iii) that there was a technical non-compliance when Dato' Mohd Dr Ghazali had presided over the DC meeting on 5 September 2018; and

(iv) that the appellant was punished and his sentence was meted out despite the appeal process not having been completed.

(d) according to counsel for the respondents, the DAC had considered the oral evidence of the appellant and that of the other persons/witnesses. Thus, it was contended that the DAC had painstakingly evaluated the said evidence and set out its findings in extenso in the DAC's minutes dated 28 June 2019. Ultimately, the DAC was satisfied that the representations; reasons set out in the appellant's letter of appeal as well as the oral evidence given by the appellant before the DAC did not exculpate the appellant from the said Charges and confirmed the DC

decision, in accordance with reg 22(1)(b), Third Schedule to Act 605 ('DAC decision');

(e) in amplification, it was contended that the DAC, upon scrutinising the DC's records of proceedings against the appellant, was also satisfied that the proceedings taken by the DC were regular in accordance with the Second Schedule to Act 605, and that he was afforded the right to be heard; and

(f) the appellant was then informed of the DAC decision via a letter, dated 23 July 2019 (which was received by the appellant on 29 July 2019), pursuant to reg 23, Third Schedule to Act 605.

JUDICIAL REVIEW

[13] The appellant filed a judicial review application, wherein the following reliefs were sought:

(a) an order and/or direction of the nature of certiorari under para 1 of the Schedule to the Courts of Judicature Act 1964 to quash the DAC decision;

(b) a declaration that the appellant's reduction of rank was without basis; and

(c) as a consequence, for an order that the appellant be reinstated to the position of Grade VK6, such reinstatement to take effect from 9 October 2018 without any loss of benefit.

[14] In the judicial review, the appellant raised the following issues:

Procedural Irregularities/Non-Compliance with Statute:

(a) that the establishment of the IIC was not within the contemplation of UPM's statutory power pursuant to Regulations 36 and 37, Second Schedule of the Act.

(b) Failure of the Investigating Committee ('IC') to inform the appellant of the date when the question of his dismissal or reduction in rank will be brought before the IC pursuant to Regulation 37(1), Second Schedule of the Act;

(c) Failure of the DC to provide reasons of the substitute members pursuant to Regulation 5(1), 3rd Schedule of the Act;

(d) Deprivation of the right to be provided with all the relevant documents relevant to the charges as required pursuant to Regulation 37(4), Second Schedule of the Act;

(e) Deprivation of the right to be present when evidence was tendered in respect of the charges and/or to challenge and cross-examine the witnesses pursuant to Regulation 37(3), Second Schedule of the Act.

[15] The appellant alleged that there was a breach of natural justice in that:

(a) there was non-compliance with the scope of the internal audit report;

(b) UPM refused to disclose information relevant to the charges of misconduct; and

(c) the appellant was denied the right to be present and/or cross-examine witnesses.

[16] The appellant also contended that there is no factual merit in the charges preferred against him.

THE RESPONDENTS' CONTENTIONS

[17] As far as the respondents are concerned, the relevant procedures prescribed in the Act vis a vis the conduct of disciplinary proceedings against the appellant had been complied with at every stage and that the appellant has failed to prove that there was any procedural impropriety in the entire conduct of the disciplinary proceedings against the appellant. In amplification, the respondents contended that:

(a) the appellant appears to have confused the events in the pre-disciplinary proceedings, which were done as part of fact-finding exercise, with the formal disciplinary proceedings commenced pursuant to the Act;

(b) the respondents have ensured that the appellant's right to a fair hearing in accordance with the rules of natural justice was sufficiently preserved, from the composition of the various disciplinary bodies; the provision of relevant documents in order for the appellant to prepare his written representation; the establishment of the IC to investigate the assertions made in the appellant's written representations; the DAC's decision to allow further (oral) evidence at the appeal stage; and

(c) the appellant's arguments of being denied the right to be heard is preposterous as he was given the opportunity to give evidence and/or submit orally before the DAC on 28 June 2019.

[18] The respondents further contend that the appellant has also failed to prove that the DAC decision was unreasonable, unlawful and/or, had failed to take into account relevant considerations and/or had taken into account irrelevant considerations and/or failed to ask the right question or alternatively asked itself the wrong question.

[19] Further, it was argued on behalf of the respondents that:

(a) the Board's direction to identify companies to develop the said projects cannot be equated to authorising the appellant to execute and/or sign any agreements relating to the development of UPM's land without obtaining the Board's approval;

(b) the mere knowledge of the Board and other relevant bodies of UPM regarding the said projects and/or said agreements is not equivalent to giving approval and/or authorisation to the appellant to enter into agreements regarding the usage of UPM's land; and

(c) the audit investigation is irrelevant to the DC/DAC decision and/or alternatively was carried out in accordance with the objective, scope and limitations imposed by the Board.

STATUTORY PROVISIONS

[20] The relevant provisions pertaining to disciplinary proceedings under the Act are as follows:

Statutory Bodies (Discipline and Surcharge) Act 2000 (Act 605)

Second Schedule

PART V

Disciplinary Procedures

32. Opportunity to be heard in disciplinary proceedings with a view to dismissal or reduction in rank

(1) Subject to sub regulation (2), *in all disciplinary proceedings under these Regulations, no officer shall be dismissed or reduced in rank unless he has first been informed in writing of the grounds on which such action is proposed and he has been afforded a reasonable opportunity of being heard.*

(2) Subregulation (1) shall not apply in the following cases:

(a) where an officer is dismissed or reduced in rank under sub regulation 28(3) or 31(3);

(b) where the appropriate Disciplinary Committee is satisfied that for some reason, to be recorded by it in writing, it is not reasonably practicable to carry out the requirements of sub regulation (1);

(c) where the Board is satisfied that in the interest of the security of Malaysia or any part thereof it is not expedient to carry out the requirements of sub regulation (1).

33. Chairman of Disciplinary Committee to determine nature of breach of discipline

(1) Where an officer is alleged to have committed a disciplinary offence —

(a) the Chairman of the Disciplinary Committee appropriate to that officer; or

(b) if there is more than one tier of Disciplinary Committee in respect of such officer, the Chairman of the Disciplinary Committee having the jurisdiction to impose a punishment other than dismissal or reduction in rank, shall, before commencing any disciplinary proceedings in respect of the officer, consider and determine whether the disciplinary offence complained of is of a nature which warrants a punishment of dismissal or reduction in rank or a punishment lesser than dismissal or reduction in rank.

(2)If the Chairman of the Disciplinary Committee referred to in paragraph (1)(a) or (b) determines that the disciplinary offence complained of is of a nature which warrants a punishment of dismissal or reduction in rank, he shall refer the case to the Disciplinary Committee which has the power to impose such punishment.

35. Procedure in disciplinary cases with a view to dismissal or reduction in rank

(1) If it is determined under regulation 33 that the disciplinary offence complained of against an officer is of a nature that warrants a punishment of dismissal or reduction in rank, the appropriate Disciplinary Committee to which the case is referred shall consider all the available information.

(2) If it appears to the appropriate Disciplinary Committee that there exists a *prima facie* case against the officer, the appropriate Disciplinary Committee shall —

(a) direct that a charge containing the facts of the disciplinary offence alleged to have been committed by the officer and the grounds on which it is proposed to dismiss the officer or reduce his rank be sent to the officer; and

(b) call upon the officer to make, within a period of twenty-one days from the date he receives the charge, a written representation containing the grounds upon which he relies to exculpate himself.

(3) If, after considering the representation made pursuant to subregulation (1), the appropriate Disciplinary Committee is of the opinion that the disciplinary offence committed by the officer does not warrant a punishment of dismissal or reduction in rank, the appropriate Disciplinary Committee may impose upon the officer any of the lesser punishments specified in regulation 40 as it deems appropriate.

(4) If the officer does not make any representation within the period specified in paragraph (2)(b), or if the officer made such a representation but the representation does not exculpate himself to the satisfaction of the appropriate Disciplinary Committee, the Disciplinary Committee shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(5) If the appropriate Disciplinary Committee is of the opinion that the case against the officer requires further clarification, the Disciplinary Committee may establish an Investigation Committee for the purpose of obtaining such further clarification.

36. Investigation Committee

(1) The Investigation Committee shall be comprised of *not less than two officers of the statutory body or the Ministry.*

(2) Members of the Investigation Committee shall be higher in rank than the officer under investigation but the Head of Department of the officer under investigation shall not be a member of the Investigation Committee.

37. Procedure to be followed by the Investigation Committee

(1) The Investigation Committee —

(a) *shall inform the officer under investigation of the date when the question of his dismissal or reduction in rank will be brought before the Investigation Committee*; and

(b) *may call and examine any witness or take any action as it thinks necessary and proper for obtaining further clarification regarding the case*.

(2) If the Investigation Committee is of the view that the officer should be allowed to be present before the Investigation Committee to exculpate himself, the officer shall present himself before the Committee for such purpose.

(3) *If witnesses are called and examined by the Investigation Committee, the officer shall be given an opportunity to be present and to cross-examine the witnesses on his own behalf.*

(4) *No documentary evidence shall be used against an officer unless the officer has previously been supplied with a copy of the evidence or given access to the evidence.*

(5) The Investigation Committee may permit the statutory body or the officer to be represented by an officer of the statutory body or, in exceptional cases, by an advocate and solicitor, but the Investigation Committee may withdraw such permission subject to any reasonable and necessary adjournment to enable the officer to present his case in person.

(6) If the Investigation Committee permits the statutory body to be represented, it shall also permit the officer under investigation to be similarly represented.

(7) If the officer under investigation who is required to appear before the Investigation Committee fails to appear on the date and at the time appointed and if no sufficient ground is shown for an adjournment, the Investigation Committee may proceed to consider and decide on the complaint or may adjourn the proceeding to another date.

(8) Upon the completion of its investigation, the Investigation Committee shall submit a report on such investigation to the appropriate Disciplinary Committee.

(9) If the appropriate Disciplinary Committee is of the opinion that the report submitted to it under subregulation (8) is vague in particular matters or that further investigation is required, the appropriate Disciplinary Committee may refer the matter back to the Investigation Committee for further investigation.

38. Further grounds for dismissal

(1) If, in the course of an investigation by the Investigation Committee, further grounds for the dismissal of the officer under investigation are disclosed, the

Investigation Committee shall inform the appropriate Disciplinary Committee of the further grounds.

(2) If the Disciplinary Committee thinks fit to proceed against the officer on such further grounds, the officer shall be given a written statement of those grounds, and the procedures set out in regulations 35, 36 and 37 shall apply in respect of the further grounds as they apply in respect of the original grounds.

39. Powers of the Disciplinary Committee

If, after considering the officer's representation and the report of the Investigation Committee, if any, the appropriate Disciplinary Committee —

(a) finds the officer guilty of the disciplinary offence alleged to have been committed by him and that the officer should be dismissed or reduced in rank, the Disciplinary Committee shall impose the punishment of dismissal or reduction in rank, as it deems appropriate;

(b) finds the officer guilty of the disciplinary offence alleged to have been committed by him but that, after taking into consideration the circumstances in which the disciplinary offence was committed and other mitigating factors, such offence does not warrant a punishment of dismissal or reduction in rank but warrants the imposition of a lesser punishment, the Disciplinary Committee shall impose upon the officer any one or more of the punishments other than dismissal or reduction in rank as specified in regulation 40 as it deems appropriate; or

(c) finds the officer not guilty, the Disciplinary Committee shall acquit him.

Disciplinary Punishments

40. Types of disciplinary punishments

If an officer is found guilty of a disciplinary offence, any one or any combination of two or more of the following punishments, depending upon the seriousness of the offence, may be imposed on the officer:

(a) *warning*;

(b) fine;

(c) forfeiture of emoluments;

(d) deferment of salary movement;

(e) reduction of salary;

(f) *reduction in rank*;

(g) dismissal.

Third Schedule

5. Appointment of substitute member

(1) The Board may, for reasons which shall be recorded, appoint any member of the Board or officer of the statutory body or nominate an officer of the Ministry to sit

as the Chairman or a member of a Disciplinary Committee in place of the Chairman or a member specified in the Appendix in any disciplinary proceedings against an officer.

(2) The officer to be appointed under subparagraph (1) as the Chairman or a member of a Disciplinary Committee shall be higher in rank than the officer who is the subject of the disciplinary proceedings.

21. Hearing of appeal

(1) Immediately after receiving the appeal documents as provided in paragraph 20, the Chairman of the appropriate Disciplinary Appeal Committee shall convene a meeting of the Disciplinary Appeal Committee to consider such appeal.

(2) The Disciplinary Appeal Committee shall decide every appeal solely on the merits of the grounds of such appeal *without admitting any further statement or additional evidence.*

(3) Notwithstanding subparagraph (2), the Disciplinary Appeal Committee *may, if it thinks just and necessary, and subject to the officer's right to be heard, request for any further statement or additional evidence from any other person.*

22. Decision of the Disciplinary Appeal Committee

(1) In considering an appeal under paragraph 21 against the decision of a Disciplinary Committee, the Disciplinary Appeal Committee may —

(a) remit the case for reconsideration to the Disciplinary Committee;

(b) confirm the decision of the Disciplinary Committee;

(c) confirm the decision of the Disciplinary Committee as regards the misconduct of that officer, but vary the punishment to a lesser punishment; or

(d) reverse the decision and punishment of the Disciplinary Committee and acquit that officer from the charge against him.

(2) The decision of the Disciplinary Appeal Committee is final.

23. Officer to be notified of decision of Disciplinary Appeal Committee

As soon as practicable after making its decision under paragraph 22 on an appeal made by an officer, the Disciplinary Appeal Committee shall notify the officer of that decision. (Emphasis added.)

MISCONDUCT — THE APPELLANT'S STAND

[21] Thus, it is relevant to ask — what was the appellant's stand vis a vis the merits and the procedural part of the disciplinary process, specifically the hearing before the DAC on 28 June 2019? In so far as the *merits* of the charge of misconduct, the position taken by the appellant is as stated in his affidavit in reply affirmed on 13 February 2020 which reads as follows:

18. I further state as follows:

18.1. I executed the Freestyle Agreement and Majmasyur Agreement pursuant to the following:

i) the Board's authorisation and/or delegation of power to the Vice Chancellor to execute any document or instrument, in the Board's 14th Meeting on 30.9.2000 [Exhibit 'MFR-2'];

ii) the Board's decision, in its 73rd Meeting in 10.3.2009 [Exhibit 'WAN-5'] authorised the Pihak Pengurusan Universiti (also known as Jawatankuasa Pengurusan Universiti, Management Committee) to execute any memorandum of understanding/and or memorandum of agreement ('MOU/MOA') without the reference to the Board so long as the Board was later informed for purposes of ratification. As the Vice Chancellor of R1 and pursuant to Rule 17A of the Universities and University Colleges Act 1971, I sit as the chairman of the Management Committee.

iii) further, the Board in its 91 Meeting sometime after February 2012 [Exhibit 'MFR-37 authorised and approved the delegation of its powers to the Management Committee to enter into any MOU/MOA so long as it conform to the Rules of Engagement ('ROE') or in accordance with the intention contained in the ROE. This was for contracts involving, inter alia, education, commercial contracts, license and development; and

iv) the Board in its 94th Meeting on 18.12.2012. [Exhibit 'MFR-3'] agreed that R1 is to identify a suitable developer to assist in developing any planned projects on R1's land.

18.2. further the Board and the relevant bodies had knowledge of and discussed the Agreements at various meetings as evident from Exhibits 'MFR-4' and 'MFR-5';

18.3. the Land and Asset Development Committee was made aware of the development of the Projects and had been discussed in its meeting on 7.3.2014 [Exhibit 'MFR-6'), and

18.4. the Agreements were also witnessed and signed by the Bursar of R1, Encik Zulkiflee Bin Othman, the party tasked with the duty for regulating the finances of R1, hence there is no basis for the allegation that it was to R1's detriment.

19. Paragraph 19 of Dato' Wan's Affidavit is denied. By the Board's delegation of power to me and the Management Committee, as explained in in paragraph 18 above, I had executed the Agreements on the basis that as *the Legal Advisory Board and all the relevant management bodies had a hand in finalising the Agreements*, the ROE had been met.

20. In response to paragraph 19.1 of Dato' Wan's Affidavit, I state that I had presented the Agreements before the Land and Asset Development Committee and they were made aware of the development of the Projects in its meeting on 7.3.2014 and 25.6.2014, where Dato' Wan had attended. There were never any objections raised by the Relevant Bodies. Any dispute or challenges raised thereafter are clearly an afterthought.

21. In response to paragraph 19.3 of Dato' Wan's Affidavit, I state that the Board's 99th Meeting dated 10.12.2013 [Exhibit 'WAN-4'] does not state that the approvals required for development projects involving R1's land ought to be prioritised as compared to the decision of the Board regarding the usage of the ROE.

22. Paragraph 19.4 of Dato' Wan's Affidavit is denied. I verily state that I have not been appointed as Vice Chancellor as at 18.12.2012 during the Board's 94th Meeting [Exhibit 'MFR-37']. I was only appointed as Vice Chancellor on 1.1.2013 and ended my term on 31.12.2015. As such, the Board would not have knowledge of the Agreements presented by me at that material time.

23. This was the normal practice of R1 and within the knowledge of all its officers and the members of the Board wherein various projects and/or agreements were undertaken without prior approval of the Board. This is also evident from the manner in which the previous Vice Chancellors carried out their duties including:

23.1. the late Dato' Ir Dr Radin Umar Radin Sohadi, the Vice Chancellor Immediately before me, (when I was the deputy Vice Chancellor) in entering into agreements relating to research and other agreements relating to colleges or faculties for the usage of R1. *During this time Associate Professor Dr Rozanah Ab Rahman, the Bursar and Dato' Wan Azman Wan Omar were members of the Management Committee*;

23.2. Tan Sri Dato Syed Jalaludin bin Syed Salim, who is presently the Pro-Chancellor in entering in the Hospital Serdang Agreement, Dewina Food Industries Agreement which monopolised the supply of food for R1, the Express Rail Link Agreement and the Malaysian Technical Development Corporation; and

23.3. the project involving the development of Putra Residence was completed without following the recognised procedure at R1 without any accountability.

24. These issues were raised in my letters to Tan Sri Dr Noorul Ainur Mohd Nur [Exhibits 'MFR-12', 'MFR-17' and 'MFR-19'] portions of which have been exhibited in Haslida's Affidavit but were ignored purportedly on the basis that it was irrelevant to the Charges. It is evident that it is in directly relevant to the basis of the Charges.

25. In the circumstances, it is evident that I did not wrongfully execute the Agreements. This is evident from the conduct of all parties in that notwithstanding having knowledge of these Agreements, no action was taken until 2018, indicating this was only an afterthought. [Exhibits 'MFR-2', 'MFR-3' and 'WAN-5'] In this regard:

25.1. the proposal was taken to the Jawatankuasa Guna Tanah (previously known as Jawatankuasa Tanah Tak Alih), where 2 members of the Board sit, by the late Dato' Ir. Dr. Radin Umar Radin Sohaidi in 2012;

25.2. in 2012 [Exhibit 'MFR-3'], I was asked by the Board to identify suitable developers to assist in the development of projects; and

25.3. the relevant bodies including the Board, the Management Committee, the Legal Adviser, the Registrar and the Bursar had knowledge of the Agreements. It

is evident that the relevant management bodies tasked with the daily management and/or operations of R1 were aware of the Agreements and that I had the mandate to enter the Agreements.

26. Paragraph 20 of Dato' Wan's Affidavit is denied. I repeat and adopt paragraph 12 above. This excuse is contrived. They have no basis to not disclose the relevant documents to me on the basis that the documents are conveniently classified as 'confidential' internally by R1.

PROCEDURAL FLAWS

[22] We turn now to the appellant's complaints on the procedural defects, specifically with regard to the hearing conducted by the DAC on 28 June 2019. In this regard, it suffices to just refer to the appellant's affidavit affirmed on 13 February 2020 where he stated the following at para 68.1:

I was not given the opportunity to listen and/or cross-examine other witnesses called on 28 June 2019.

[23] The significance of the date, 28 June 2019 is that, it is the date when the DAC had convened the hearing of the appellant's appeal and it was on that date that the appellant and other witnesses (*including Dr Rozanah*) were called to testify. The crux of the appellant's complaint is that the evidence of the other witnesses were not taken in his presence, and that he was in the dark as to what each of the witnesses had said to the DAC. And he had no opportunity to rebut, contradict or seek clarification (if necessary) of the evidence taken before the DAC. The first respondent's response is firstly, that there is no right to cross-examine, and secondly, the appellant did not ask to be present when the others testified, and thirdly, did not ask for permission to cross-examine the other witnesses.

[24] The respondents sought to neutralise the appellant's said complaint and their response may be gathered from the affidavit-in-reply affirmed by Haslida bt Hassan ('Haslida') on 26 February 2020. Haslida was *Ketua Unit Integriti Pejabat Naib — Cancelor di Universiti Putra Malaysia dan Urus Setia Jawatankuasa Tatatertib dan Urus Setia Jawatankuasa Rayuan Tatatertib.* At para 43.1 the said affidavit, Haslida averred that, 'During R2's [DAC's] meeting on 28 June 2019, Applicant *did not request to listen and/or cross-examine the other witnesses* and as such. I am advised by respondents solicitor and verily believe based on the said advise that the *Applicant has denied his own right to attend and/or cross-examine other witnesses*'. (Emphasis added.)

[25] It is clear and quite obvious that by taking such a stand — that the appellant 'did not request to listen and/or cross-examine the other witnesses' and that as such, he 'has denied his own right to attend and/or cross-examine

other witnesses', the respondents were effectively contending that the appellant had 'waived' his rights. We will deal with the issue of 'waiver' in the later part of this judgment when we discuss the jurisprudence on the *audi alteram partem* component of the rules of natural justice and specifically, whether there can be a waiver of a fundamental procedural flaw. At this juncture, it is fair to state that the testimony of the witnesses who testified before the DAC did play a part in the decision-making process of the DAC. In this regard, it is relevant to refer to the affidavit of Haslida affirmed on 3 January 2020 where she stated at paras 40 and 41 of her affidavit as follows:

> 40. Maka, *setelah mengambil kira keterangan-keterangan Pemohon serta pegawai-pegawai yang lain*, Rayuan Pemohon serta rekod prosiding tatatertib JKTT, adalah dapatan R2 bahawa alasan-alasan rayuan yang dikemukakan oleh Pemohon tidak dapat meringankan hukuman yang telah dikenakan oleh JKTT. Oleh itu, R2 telah mengesahkan Keputusan JKTT selaras dengan Peraturan 22(1)(b), Jadual Ketiga, Akta tersebut ('Keputusan R2').
>
> Sesalinan Minit Mesyuarat R2 Bil 2/2019 pada 28.6.2019 beserta *butiran keterangan yang dicatat secara ad verbatim* adalah kini dikemukakan dan ditunjukkan kepada saya dan dilampirkan di sini bertanda Ekshibit 'HH-18'.
>
> 41. Oleh yang demikian, saya menyatakan di sini bahawa melalui surat bertarikh 23.7.2019 yang ditandatangani Pengerusi R2, Pemohon telah dimaklumkan berkenaan Keputusan R2, di mana R2 telah menolak Rayuan Pemohon dan mengekalkan hukuman yang dikenakan oleh JKTT ('Surat Keputusan R2'). (Emphasis added.)

DAC HEARING — 28 JUNE 2019

[26] From the chronology of events, we know that after the DC had found the appellant guilty of the charge of misconduct (insubordination) and imposed with a sentence, he filed an appeal with the DAC. The DAC convened a hearing on 28 June 2019. The third respondent chaired the hearing. The DAC heard the testimony of certain witnesses. The witnesses who testified before the DAC on 28 June 2019 were as follows:

Name	Designation
Prof Dato' Dr Mohd Fauzi bin Ramlan	Pegawai yang merayu/Mantan Naib Canselor ketujuh UPM (1 January 2013–31 December 2015)/Profesor (Gred VK7)
Profesor Madya Dr Rozanah Ab Rahman	Mantan Penasihat Undang-Undang (15 September 2011–15 September 2017) Profesor Madya Gred DS54
Dato' Wan Azman bin Wan Omar	Pendaftar UPM (Gred VU6)
Puan Zainora Abdul Talib	Ketua Bahagian Audit Dalam UPM (Gred W54)

Encik Zulkiflee bin Othman	Bursar UPM (Gred VU7)
Profesor Madya Dr Shamsul Bahari bin Mohd Noor	Mantan Pengarah Pembangunan Pejabat Pembangunan UPM (PPPA) dan Pengurusan Aset (1 June 2011–10 June 2014) Profesor Madya (Gred DS54)

[27] It is not stated in the minutes of the DAC whether the appellant was asked to leave the proceedings after he had given his testimony but as a matter of record, the appellant has already stated (via affidavit) that he '... was not given the opportunity to listen and/or cross-examine other witnesses called on 28 June 2019'. This has not been repudiated. But counsel for the respondents was candid enough to confirm that it is true that the appellant was not present when the witnesses testified before the DAC, and there is no evidence that he was apprised of what had transpired before the DAC. The respondents' position is that under reg 21(3), Third Schedule Act 605, there is no right accorded to the appellant for cross-examination of witnesses and (*according to the respondents*) the appellant was fully accorded the 'right to be heard' under para 21(3). Thus, the imperative question to be decided is whether the procedure adopted by the DAC on 28 June 2019 was in accordance with the appellant's right to be heard.

[28] We turn now to Dr Rozanah's testimony before the DAC. Dr Rozanah's testimony (*verbatim*) was as follows:

Puan Haslida Hassan	Dr Rozanah diminta memberi penjelasan tentang tanggungjawab Penasihat Undang-Undang menasihati mantan Naib Canselor sebelum menandatangani perjanjian antara UPM dengan Freestyle kerana dalam rayuan mantan Naib Canselor ada menyebut tanggungjawab menasihati pada Pendaftar dan Penasihat Undang-Undang.
Prof Madya Dr Rozanah Ab Rahman (mantan Penasihat Undang-Undang)	It's about advise is it? YB, tentang penasihatan ni saya nak jelaskan everytime sometime people get confuse or not knowing bahawa sekiranya if an advise is not scout for so how can we advised bermaksud sebelum penasihatan boleh diberikan ianya perlu di request if you need an advise you should request what are the specific advised that you need. So in the absence of the request we are not going to what I mean ask you bother about what you're doing to advise I mean. Advise perlu dibagi berdasarkan apa yang di request ikut di advise then note.

	Tentang perkara perjanjian ini seingatan saya sebab saya tiada dokumen di hadapan saya berdasarkan ingatan saya perjanjian minit-minit berkaitan tatacara perjanjian, tandatangan perjanjian memasuki perjanjian memang kita patuhi sebab setiap minggu kita ada mesyuarat JPU. Di mesyuarat JPU itulah semua perjanjian di bawa masuk untuk dipersetujui atau dilihat kandungannya untuk sama-sama diikuti proses sehingga tandatangan. So maksudnya jika disebut tentang penasihatan tatacara perjanjian MOU very-very clear the advise is not only had be given it is proses yang setiap minggu itu dilalui oleh ahli JPU menasihati VC dan di dalam mesyuarat JPU itulah dipersetujui perjanjian mana yang akan di bawa ke LPU dan seterusnya. Jadi bagi saya penasihatan very clear every one in JPU very clear about process menandatangani perjanjian dan jika tidak disebut apakah spesifik advise yang diminta yang saya tidak beri maka makanya perjanjian itu tidak ada sebab jika dalam rekod register pejabat saya, I mean Pejabat PUU setiap penasihatan yang diminta memang kami buat secara bertulis dan di return advise and di rekod di our register. So itu adalah amalan yang kami buat di Pejabat PUU. Seingatan saya tiada lagi advise yang diminta yang tidak kami respon. Begitu my point advise Dr.
Dato' Charon Wardini	So, this Freestyle agreement was discuss dekat di meeting ini?
Prof Madya Dr Rozanah Ab Rahman	Seingatan saya, saya ada memberitahu YBhg Dato' VC pada waktu itu perjanjian ini perlu di bawa melalui proses seperti yang kita ketahui proses-prosesnya dan beliau mengatakan yes he know about it Cuma kekangan masa tak silap saya masa itu LPU tidak bersidang dan sebagainya dan atas kuasa eksekutif beliau kerana memang ada perjanjian-perjanjian yang ditandatangani dahulu dan di bawa kemudian kepada board untuk diratifikasi atau dimaklumkan, ada 2 keadaan kerana

	VC lebih tahu yang mana perjanjian untuk kepentingan universiti. Benda itu memang kita ada beberapa perjanjian yang tak semestinya mesti melalui board dahulu baru tandatangan atas sebab-sebab tertentu hanya VO yang know where about the matters. So kita apabila diberitahu oleh VC dia nak tandatangan kita mesti sediakan perjanjian itu. Takkan kita nak halang perjanjian itu daripada di tandatangan. Jadi kita sediakan perjanjian itu dan kemudiannya beliau bawa masuk ke JPU dan kemudian di bawa ke LPU untuk ratifikasi cuma masalahnya timbul semasa di bawa ke board itu, board itu tidak mahu ratifikasikan perjanjian itu yang seingatan saya kenapa jadi stuck perjanjian ini.
Dato' Mat Roni	YBM, maknanya kes Freestyle maklum and kelulusan LPU (dia punye term tu) ataupun just one look.
Puan Haslida Hassan	Ia mesti di bawa untuk pertimbangan dan kelulusan sebenarnya dalam minit 99. Ia tidak seperti agreement lain boleh ditandatangan dahulu dan maklum kemudian mcm ROE.
Prof Madya Dr Rozanah Ab Rahman	Itu sebab Yang Berbahagia YB, bagi legal we always try to make others understand kelulusan itu di mana-mana organisasi sama ada syarikat ke ataupun institusi there are certain situation where the executive cannot wait for the board but only he take the risk or take the decision on his hand maknanya dia akan buat keputusan itu atas kepentingan organisasi dia perlu untuk meneruskan tetapi dia boleh mendapatkan kelulusan itu melalui ratifikasi so legally ni we have two ways of getting any documents legalise either manager did it first and get their ratification that means approve or get ratification earlier before signing of course the safer way. Tetapi itu yang saya katakan tadi hanya VC tahu bahawa perjanjian itu tidak menjejaskan kepentingan universiti dia perlu untuk memasuki dengan Board ke dan atas dasar itu maka diteruskan tetapi di bawa kelulusan masih tapi melalui proses kita panggil ratifikasi. Ratification in law there is a principle about that. Itu yang everytime saya cuba fahamkan tentang proses-proses kelulusan itulah.

Dato' Mat Roni	Maknanya yang kes Dato' Fauzi ni dalam konteks ingkar perintah?
Prof Madya Dr Rozanah Ab Rahman	Itu saya not me maybe to answer because itu charge yang di bawa oleh jawatankuasa. Saya tidak mencadangkan apa-apa, saya menerangkan proses because I am asked about the agreement right kelulusan itu apa maksudnya they are 2 ways of getting approval I did mention this also masa saya ditanya dalam Jawatankuasa Siasatan Dalaman UPM. Saya jawab yang sama proses kelulusan ada 2. Either dibawa sebelum tandatangan atau lepas tandatangan dibawa untuk kelulusan melalui ratifikasi tetapi risikonya jika tidak di approve bagaimana, dan inilah berlaku pada perjanjian itu. Board didn't want to approve the agreement.
Prof Madya Dr Rozanah Ab Rahman	Dan untuk legally point dari situ jika kita lihat dari sudut legal memang macam itu sebabnya apabila manager made early decision they have to take the risk on them if what if the board did not approve because dia nak kena prove kenapa dia buat mendahului daripada board itu but if the board fine then it is fine. Itu keadaannya.
Dato' Charon Wardini	So when the professor said there was some ealier letter that allow him to sign, takda lah letter tu.
Prof Madya Dr Rozanah Ab Rahman	Earlier letter that allow agreement to sign, ada satu surat itu dipanggil daripada PUU surat itu memang telah menjadi pertikaian dan saya dah jawab juga situasi surat itu dalam Jawatankuasa Siasatan Dalaman should be semua fakta yang saya jawab ini dah ada dalam JKSD pertimbangkan, not at this stage but at that stage. So dalam itu saya terangkan surat itu mengatakan perjanjian itu dah di minta oleh VC untuk di prepare, k we must prepare the agreement for the signing, so I have to put that letter because itu administratively apabila any agreement nak keluar, kita akan tuliskan surat bahawa ini perjanjian dfa dan tandatangan tempat yang sepatutnya dalam perjanjian. It is merely letter to submit the agreement for the signing as requested by the VC.
Dato' Charon Wardini	VC said in 2006 and 2008 dulu-dulu he was given permission to sign the agreement.
Puan Haslida Hassan	Minit tu overlaken by minit 2012.

Dato' Charon Wardini	So ada la surat tu, ada la.
Puan Haslida Hassan	Minit-minit lama tu ada la, tapi tak da sekarang.
YB Menteri	It has been overruled.
Prof Madya Dr Rozanah Ab Rahman	Minit-minit LPU memang tidak pernah membatalkan satu sama lain. The minutes stand on its own. Every each of the minute. Jadi minit terdahulu memang VC boleh sign semua perjanjian, jadi kami sediakan perjanjian itu atas arahan dan yes can sign cuma proses itu kita dah bagi tahu dan VC kata yes he aware he will bring it to LPU for approval. Tetapi proses ini bukan sebelum ratification because he sign it first. So we had secara lisan pagi tu saya bercakap dengan Dato'-Dato' he is aware but he will bring it to the LPU. Itu keadaannya. PUU mesti keluarkan also to protect the office that we give instruction to prepare the agreement and therefore is the agreement that he want to sign.
YB Menteri	He said that he's aware?
Prof Madya Dr Rozanah Ab Rahman	He's aware of?
Puan Haslida Hassan	The process.
Prof Madya Dr Rozanah Ab Rahman	Owh ok the process ya sebab memang bawa ke JPU dan LPU itu kita pun memang buat setiap minggu perjanjian. la memang proses itu memang kita lakukan everytime bukan sesuatu yang tak pemah buat. Memang ada perjanjian tapi VC sign dahulu.
YB Menteri	Ok Dr Rozanah. Thank you very much for your corporation. Assalamualaikum Selamat Hari Raya
Prof Madya Dr Rozanah Ab Rahman	Sama-sama. Waalaikumsalam.

[29] The gist of the explanation given by Dr Rozanah to the DAC was that the agreements were prepared by UPM's Legal Department and the Vice-Chancellor had the power to sign the agreements, which were then taken to the Board for ratification. She went on to say there were previous occasions when this was done. She said:

> ... they are 2 ways of getting approval I did mention this also masa saya ditanya dalam Jawatankuasa Siasatan Dalaman UPM. Saya jawab yang sama proses kelulusan ada 2. Either dibawa sebelum tandatangan atau lepas tandatangan dibawa untuk kelulusan melalui ratifikasi tetapi risikonya jika tidak di approve bagaimana, dan inilah berlaku pada perjanjian itu. Board didn't want to approve the agreement.

[30] In the earlier part of her testimony, Dr Rozanah said:

> bagi legal we always try to make others understand kelulusan itu di mana-mana organisasi sama ada syarikat ke ataupun institusi there are certain situation where the executive cannot wait for the board but only he take the risk or take the decision on his hand maknanya dia akan buat keputusan itu atas kepentingan organisasi dia perlu untuk meneruskan tetapi dia boleh mendapatkan kelulusan itu melalui ratifikasi so legally ni we have two ways of getting any documents legalise either manager did it first and get their ratification that means approve or get ratification earlier before signing of course the safer way. Tetapi itu yang saya katakan tadi hanya VC tahu bahawa perjanjian itu tidak menjejaskan kepentingan universiti dia perlu untuk memasuki dengan Board ke dan atas dasar itu maka diteruskan tetapi di bawa kelulusan masih tapi melalui proses kita panggil ratifikasi. Ratification in law there is a principle about that. Itu yang everytime saya cuba fahamkan tentang proses-proses kelulusan itulah.

[31] In fairness to the appellant, we think that the testimony of Dr Rozanah could fairly and reasonably be construed as being in favour of the conduct of the appellant in doing what he did vis a vis the agreements — execute first and then submit it to the Board for ratification. Before us, counsel for the respondents agreed that Dr Rozanah's testimony before the DAC was in the appellant's favour. However, counsel for the respondents argued that Dr Rozanah's testimony touches on the 'merits' and that the court should decline to enter into the arena of merits.

[32] On the other hand, counsel for the appellant argued that while the DCA heard evidence of various witnesses including and in particular the evidence of Dr Rozanah (who said, inter alia, that the agreements were prepared by the Legal Department and the Vice-Chancellor had the power to sign the agreements, which were then to be taken to the Board for ratification), the appellant was deprived of the opportunity to listen to the evidence relied upon and/or to challenge or rebut or contradict the same. Counsel for the respondents downplayed the evidence given by Dr Rozanah and said that it is 'factual and pertains to the merits of the Decision'. According to counsel, Dr Rozanah's testimony is *irrelevant* to the judicial review or this appeal as the courts ought not interfere with the findings of fact by the DAC.

[33] The appellant also took umbrage with the role played by Haslida Hassan as secretary of the DCA. According to counsel for the appellant, the minutes of the DCA show that she provided evidence against the appellant in his absence. Counsel for the respondents contended that Haslida was the DAC secretary and had attended the DAC proceedings on 28 June 2019 in a purely administrative capacity and there is no evidence that she gave evidence as a witness at the DAC proceeding against the appellant or at all.

OUR DECISION

[34] This appeal raises several issues pertaining to the substantive and procedural aspects of the law on administrative disciplinary proceedings. However, on examining the matter comprehensively, we concluded that the appeal ultimately and essentially pivots on the following issues which will determine the outcome.

[35] The issues are:

(a) whether any alleged deficiencies in procedural fairness at the initial stage of disciplinary inquiry may be retrospectively cured by a subsequent appellate hearing, as contemplated by the Privy Council in *Calvin v Carr and others* [1979] 2 All ER 440; [1980] AC 574 (PC) ('Calvin v Carr') and the extent to which internal or domestic appellate mechanisms, can, if at all, rectify earlier procedural injustices;

(b) next, whether in the context of administrative disciplinary proceedings, the principle enunciated by the Privy Council in *University of Ceylon v EFW Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 (PC) ('Fernando') — that there is no violation of the rules of natural justice if the disciplinary authority interviewed witnesses including and in particular, the complainant, without the presence of the accused person (student or academic personnel) who is facing disciplinary action, and without informing the latter person of what was said by the other witnesses, and without allowing an opportunity to rebut or contradict the evidence of those other witnesses, is inherently and jurisprudentially incompatible with the Privy Council's subsequent decision in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169 (PC) ('Kanda') which enunciated that a person must be afforded an opportunity to know and meet the case against him and that the principle of *audi alteram partem* would be violated if a disciplinary body considers (undisclosed) evidence 'behind the back' of the accused employee.

NATURAL JUSTICE — *AUDI ALTERAM PARTEM*

[36] The doctrine of natural justice rests on two fundamental pillars. The first is *nemo judex in causa sua* (rule against bias). The first rule ensures impartiality and fairness in decision-making by requiring that no one should act as a judge in a matter where they have a personal interest or where there is a reasonable apprehension of bias. The second is *audi alteram partem* (right to be heard), which lies at the heart of our present appeal. The right to be heard guarantees that a person affected by a decision has been given a fair opportunity

to present their case, respond to evidence, and make representations before any adverse action is taken against them.

[37] The House of Lords' decision in the case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 (HL) ('*CCSU* case') is a classic landmark case that serves as a timeless reminder of the court's role in upholding procedural fairness. The term 'procedural impropriety' encompasses not only breaches of the basic rules of natural justice, such as bias or denial of the right to be head, but also failures by administrative bodies to comply with procedural requirements expressly set out in the legislation conferring their powers.

[38] In the words of Lord Diplock, at p 411 of the *CCSU* case:

> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

[39] Lord Diplock's decision in the *CCSU* case underscores that the concept of procedural impropriety is broader, ensuring that failure to adhere to procedural rules can be a basis for judicial review, as adherence to the proper procedures itself serves as a safeguard of fairness and accountability against arbitrary administrative decision-making.

[40] We turn now to the relevant statutory rules for the conduct of proceedings before the DAC. They are as follows:

Paragraph 21, 3rd Schedule to Act 605, which provides as follows:

> (2) The Disciplinary Appeal Committee shall decide every appeal solely on the merits of the grounds of such appeal *without admitting any further statement or additional evidence.*
>
> (3) Notwithstanding subparagraph (2), the Disciplinary Appeal Committee *may, if it thinks just and necessary, and subject to the officer's right to be heard, request for any further statement or additional evidence from any other person.* (Emphasis added.)

[41] Of course, the overarching principle here is as stated in reg 32(1) of the Second Schedule (Part V) of the Act which provides that a staff cannot be reduced in rank unless he has been afforded a reasonable opportunity of being heard. And, in so far as the proceedings before the DC is concerned, it is important to note that pursuant to reg 35(2)(b) of the Second Schedule

(Part V) of the Act , the employee is to be informed of the charge of misconduct and he must within the stipulated timeline submit, 'a written representation containing the grounds UPM which he relies *to exculpate himself*'.

[42] Against this backdrop, after the DC has made a finding of guilt and imposed punishment of reduction in rank and an appeal is lodged, the DAC may determine the appellant's appeal without any further evidence. But, it could, as a matter of discretion, also request for further or additional evidence. Clearly, the DAC is the master of their own procedure. But it is nevertheless trite that merely going through the process mechanically is not sufficient, and that it is of the first, and fundamental importance that the process must not only be fair, but *must be manifestly be seen to be fair.* See: *R v Sussex Justices, ex parte McCarthy* [1923] All ER Rep 233; [1924] 1 KB 256 per Lord Hewart CJ — 'There is no doubt, as has been said in a long line of cases, that it is not merely of some importance, but of fundamental importance, that *justice should both be done and be manifestly seen to be done*'. Hence, in some cases, even the appearance of possible procedural unfairness can undermine legitimacy of an administrative body decision. As such, when a adjudicating body such as the DAC adjudicates matters, it is not enough for them to be fair, 'they must also appear to be fair'.

[43] The question ultimately is whether on the whole, the DAC had conducted the appeal proceedings fairly. See: *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 (HC) ('*Rohana*'s case') per Edgar Joseph Jr — 'It was accepted that whilst the disciplinary authority was not bound to observe strictly the procedure which applied to courts of law, nevertheless this did not mean that it had carte blanche to follow any procedure it chose. That this must be so is I think dictated by the principle that *the disciplinary authority had to act with fairness*' (see: p 496 (MLJ)).

[44] In this regard, it is relevant to mention that this court had dealt with the topic of procedural fairness in the case of *Mohamad Adri' Ammar bin Mohamad v Suruhanjaya Pasukan Polis & Anor* [2023] MLJU 2405 (CA) where we had opined (*in the context of that case*) that the disciplinary body's failure to furnish the requisite documents resulted in procedural unfairness to the police officer who was dismissed for misconduct. In that case, the appellant had made an oral request for the documents but the respondents had failed to supply the appellant the report and documents which the disciplinary board had relied upon in reaching its decision to find the appellant guilty of the charge of misconduct. The appellant applied for judicial review but failed (see: High Court's decision at *Mohamad Adri' Ammar bin Mohamad v Suruhanjaya Pasukan Polis & Anor* [2022] MLJU 351).

[45] The Court of Appeal allowed the appellant's appeal. In that case, the

Court of Appeal had examined several cases and alluded to the principles which were established by those cases. In the present context, we feel that it is necessary to reproduce the relevant parts of the judgment in *Adri*'s case pertaining to the rule that a disciplinary authority must ensure that the employee concerned is afforded procedural fairness. The passages read relevantly as follows:

> [20] It is trite that in cases of this nature, the court will not, via the process of judicial review, intervene on the substantive or qualitative aspects of the charges of misconduct. The reason for such non-intervention is that these are matters which are more suited for the fact-finding jurisdiction of the disciplinary bodies themselves. But on the other hand, the court will intervene where there are procedural flaws or missteps or breaches of the rules of natural justice.
>
> [21] Thus, *if the court is convinced that the disciplinary authority did not act fairly in terms of the procedural aspects, then the court will intervene*. In *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 at pp 165–166; [2012] 3 CLJ 577 at pp 597—598 the Federal Court held that the courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings. The courts will only intervene in disciplinary cases where there was a fundamental procedural flaw.
>
> [22] In the present case, the learned judicial commissioner concluded that '*there is no contemporan*eous documentary evidence to support the appellant's bare assertion and since there is nothing in his representation to show that an oral request for certain documents was ever made by him (save for the CCTV recording in relation to charge 2) I am in no position to make a finding of fact that such an oral request was indeed made'.
>
> [23] The issue which took centre stage in this appeal is in regards to the appellant's complaint that he had made an oral request for the documents but the respondents had failed to supply the appellant the report and documents which the Disciplinary Board had relied upon in reaching its decision to find the appellant guilty of the charge of misconduct (first charge).
>
> THE LAW
>
> [24] It is trite that where a request for documents has been made, then in the event of a failure to give those documents, the decision of the decision maker to dismiss a public servant will be rendered as null and void. Hence, for example, where documents are relied upon by the disciplinary authority behind the back of the employee who was not even aware that her previous employment record were being looked at, and without giving her an opportunity to state her case in respect of the past record, then that would constitute a serious procedural flaw which vitiated the dismissal.
>
> [25] This is exactly what happened in *Shamsiah binti Ahmad Sham v Public Services Commission, Malaysia & Another* [1990] 3 MLJ 364 (SC) ('Shamsiah'). In *Shamsiah*, the appellant, a book-binder with the Government Printing Department, was dismissed by the Public Services Commission after she was found guilty of negligence and dereliction of duty. She subsequently applied to the High

Court for a declaration that her dismissal was null and void and for other ancillary orders. Her application was dismissed in the High Court. She appealed.

The core of her complaint was the fact that the Public Services Commission in arriving at its decision to dismiss her from service had considered extraneous matters, namely, the appellant's record of past conducts which were entered in her record of service and produced by the Director-General of the Government Printers Department to the Public Services Commission without giving her an opportunity to explain, contradict or rebut them. The Supreme Court concluded that the disciplinary authority had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the 1969 Regulations. The concept of natural justice was lucidly discussed in the following paragraphs of the Supreme Court's judgment (p 367 (MLJ)):

> At this juncture we would interpolate to say briefly on the application of the rule of natural justice. The *audi alteram partem* or hearing rule which Lord Diplock classified as 'procedural impropriety' and which Lord Roskill suggested to be replaced by 'duty to act fairly' in *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 at pp 410–411 and 414, is now a new common law concept introduced in Malaysia. It has been in existence and observed by our courts since the landmark case of *Kanda v Government of the Federation of Malaya* [1962] 1 MLJ 169 and it had already been entrenched, in so far as civil servants are concerned, in art 135(2) of the Federal Constitution and introduced in a statutory form in reg 27 of 1969 Regulations. We can say with confidence that public authorities in Malaysia are now very much aware of these principles and have adhered to them conscientiously. What seems to be the recurring problem, as is illustrated in the present appeal, is their application to a particular case or a situation. The principles can be misconceived in good faith but as far as the court is concerned it would intervene by judicial review if a decision of any administrative tribunal or any administrator was reached in breach of the rules of natural justice. The cases of *Kanda* [1962] 1 MLJ 169, *Inspector-General of Police v Alan Noor* [1988] 1 MLJ 260 and *Sambasivam* [1971] 2 MLJ 181 and *Mahadevan v Anandarajan & Ors* [1970] 1 MLJ 50 are illustrations of the application of these principles. The core of the appellant's complaint in regard to the breach of the rules of natural justice was the fact that the first respondent, in arriving at its decision to dismiss her from service, took into account extraneous matters, namely, the appellant's record of past conducts which were entered in her record of service and produced by the Director-General of the Government Printers Department, Kuala Lumpur to the first respondent without giving her an opportunity to explain, contradict or rebut them.

[26] The gravamen of the appellant's complaint in *Shamsiah*'s case was that her past records were taken into account in arriving at their decision to dismiss her from service in circumstances where she was not given the chance to state her case vis a vis her past record. The Supreme Court treated this as a matter of fundamental importance. It was not a mere technicality.

[27] This is how the Supreme Court approached the issue (p 368 (MLJ)). What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conducts, considering that the dismissal of a civil servant is no light matter. The matter is not free from authorities and the law on it is well settled. We find support for this proposition in many cases. In the case of *Kanda v Government of the Federation of Malaya* [1962] 1 MLJ 169 Lord Denning at p 172 said:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* [1911] AC 179 down to the decision of their Lordship's Board in *Ceylon University v Fernando* [1960] 1 WLR 223. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might to do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has access to the judge without his knowing.

[28] The Supreme Court then concluded (p 369 (MLJ)) as follows:

> We wish to add that it has been held that tribunals must not continue privately to obtain evidence or other information between the conclusion of the hearing and the making of the decision, without notifying the parties so as to give them an opportunity to make submissions on it. See for example *R v Deputy Industrial Injuries Commissioner, ex p Jones* [1962] 2 QB 677 and *Fairmont Investments Ltd v Secretary of State for the Environment* [1967]1 WLR 1255. It was manifestly demonstrated to us that the first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the 1969 Regulations. On this ground and based on the authorities we have cited in our judgment we have no alternative but to allow this appeal.

[29] Quite clearly the Supreme Court in *Shamsiah*'s case had placed heavy reliance, inter alia, on the earlier Privy Council's seminal decision in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169 (PC) ('*Kanda*'s case'). In *Kanda*'s case, the appellant was a police inspector who had been dismissed. The disciplinary authority was the adjudicating officer. Kanda was unaware of the existence of a report by the Board of Inquiry. The report vilified Kanda. Kanda was unaware that the report was sent to the adjudicating officer. The existence of the report and the fact that the adjudicating officer was privy to it, only emerged on the fourth day of the trial of Kanda's action to impugn his dismissal as being null and void. The judge held that there was breach of natural justice and ruled in Kanda's

favour. The government appealed. The Court of Appeal (by majority) allowed the appeal. Kanda took his case to the Privy Council. The question for the Privy Council was whether the hearing by the adjudicating officer was vitiated by his being furnished with the report without Kanda being given any opportunity of correcting or contradicting it. The judgment of Privy Council was given by Lord Denning. He said (pp 172–173 (MLJ)):

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.
>
> This appears in all the cases from the celebrated judgment of Lord Loreburn, LC in *Board of Education v Rice* [1911] AC 179 at p 182; 27 TLR 378 down to the decision of their Lordships' Board in *Ceylon University v Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 (PC). It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.
>
> The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.
>
> Instances which were cited to their Lordships were *Re Gregson* (1894) 70 LT 106, *Rex v Bodmin Justices* [1947] KB 321; [1947] 1 All ER 109 and *Goold v Evans* [1951] 2 TLR 1189 to which might be added *Rex v Architects Registration Tribunal* [1945] 2 All ER 131; [1945] 61 TLR 445 and many others.
>
> Applying these principles their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J in these words: 'In my view, the furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal'.

[30] The next case of importance is the seminal decision of Justice Edgar Joseph Jr (as he then was — later FCJ) in *Rohana Bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 (HC) ('*Rohana*'s case'). Before we quote from *Rohana's* case, it is apt perhaps to allude to a passage from Justice Gopal Sri Ram's judgment in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 (CA), where he referred to the importance of *Rohana*'s case and its impact on administrative law in Malaysia:

> The concept of procedural fairness was first introduced into our jurisprudence

A by the decision of Edgar Joseph Jr J (as he then was) in *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487. Apart from being a case of general importance in the field of administrative law, it sets out, in particular, a useful summary of the principles, distilled from numerous authorities, upon which our courts will intervene by way of judicial review

B [31] We now come back to *Rohana*'s case. In that case university lecturers had been punished with warnings and reduction of salary pursuant to disciplinary action that was taken against them. They applied for judicial review to quash the decisions by the university. The High Court distilled several key principles of administrative law and expounded on these principles and applied it to the case at hand. But the C principles that were enunciated in *Rohana*'s case have since become principles of general importance and are applicable across the board to almost all aspects of administrative law, particularly on the 'duty to act fairly' and the due observance of the principle of natural justice. In that case, Justice Edgar Joseph Jr referred to a decision by the House of Lords and said that where an administrative action D imperils life (which has since been interpreted as including the 'right to a livelihood') or liberty, then the courts must subject the administrative decision to a more 'vigorous examination'. Thus, the administrative process must be 'flawless'. Anything less will not suffice. At page 489 MLJ, the learned judge said:

E I would, however, in passing, and as a matter of general interest, remark that there are dicta in administrative law cases in the UK which indicate that judges there are beginning to depart from their traditional preference of dealing with the technicalities of remedies rather than the principles governing official action and individual rights. For example, in a recent immigration case *Bugdaycay v Secretary of State for the Home Department* [1987] 1 All ER 940, in the House F of Lords, Lord Bridge stated that courts are entitled within limits:

to submit an administrative decision to a more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which G may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

And Lord Templeman said this:

Where the result of a flawed decision may imperil life or liberty a special H responsibility lies on the court in the examination of the decision-making process.

[32] Touching on the failure to provide the affected party with the documents that would be used against him in the disciplinary proceedings, Justice Edgar Joseph Jr said (p 494 (MLJ)):

I *It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review; for example, a defendant is generally entitled to notice of evidence that might assist his case. It is, therefore, a breach of natural justice for the prosecution to conceal such evidence: R*

v Leyland Justices, ex p Hawthorn [1979] QB 283.

Both before the commencement of the proceedings before the disciplinary authority and at those proceedings, the applicants had, through their solicitors, asked for all relevant information and documents in the possession of the disciplinary authority on the ground that without such material it would be difficult to put up an adequate defence but they were told that only copies of such documents as the board deemed fit would be supplied at the hearing but that some documents before the board were confidential and could not be supplied though the board would act in accordance with the rules of natural justice.

The question which now arises for decision regarding this part of the case is whether the effect of the refusal of the disciplinary authority to accede to the requests of the applicants' solicitors and counsel for, what I shall, for the sake of brevity and convenience refer to as 'pre-trial discovery', was tantamount to denying the applicants their right to make written representations guaranteed to them under r 27(4)(e) of the said Rules which provide:

> Where the staff member accepts the opportunity to appear in person before the disciplinary authority —
>
> (a) he may make, either orally or in writing or both orally and in writing, such representation as may in the opinion of the disciplinary authority be relevant to the alleged breach of discipline:
>
> Provided that where any representations are to be made in writing, the same shall be forwarded to the disciplinary authority not less than ten days before the aforesaid date of appearance before the disciplinary authority.

In my view, a reading of the above provisions makes it clear that in order that an applicant might be in a position to submit written representations ten days before the date of appearance before the disciplinary authority, he must be in possession of copies of all relevant documents and information relating to the charges brought against him a reasonable time before such date.

I am fortified in my view, and I derive analogical support from r 26(7) of the Public Officers (Conduct and Discipline) General Orders 1980 (Chapter D), which, although it applies only to members of the public service as defined in art 132 of the Constitution so that lecturers of the respondent university are outside its scope, provides:

> If witnesses are examined by the committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and *no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto*. (Emphasis added.)

In my opinion, r 26(7) of Chapter D has a common law content so that reliance can be placed upon its provisions by the applicants in support of their right to claim pretrial discovery.

Now, it is right to say, at the risk of being trite, that *the right to be heard necessarily means the right to know the case against oneself.*

> Having regard to the provisions as to the disciplinary procedure, in particular, rr 25 and 27 of the said Rules, it is clear that it is the disciplinary authority itself that makes a preliminary investigation as to whether the breach of discipline complained of merits the prescribed punishment and, if so satisfied, conducts a formal hearing. Those Rules therefore envisage that the disciplinary authority must be already in possession of all relevant documents before the hearing and it can be reasonably presumed that in the present case that was so. Indeed, no attempt was made to suggest the contrary by counsel for the respondent university.

[33] We turn now to the Court of Appeal's decision in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 (CA). In that case, Justice Gopal Sri Ram JCA (later FCJ), equated the term 'life' in art 5(1) of the Federal Constitution to include 'livehood' and thus, 'the right to continue in public service subject to removal for good cause by resort to a fair procedure'. In this regard, he said:

> In my judgment, the courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation.

They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression 'life' in art 5(1) is given a broad and liberal meaning. Adopting the approach that commends itself to me, I have reached the conclusion that *the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members.* It includes the right to live in a reasonably healthy and pollution free environment. *For the purposes of this case, it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure.*

[34] We turn next to the case of *Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia* [2018] 12 MLJ 17; [2018] 9 CLJ 141 (FC) ('*Vijayarao*'s case') where Ramly Ali FCJ, opined that a failure to provide a public officer with the documents which had been requested would vitiate the disciplinary proceedings and render the punishment of dismissal as null and void. In that case the learned judge speaking for the Federal Court said:

> [81] In the present case, the appellant had also complained that *he was not given any document at all by the PSC notwithstanding that specific request was made for those relevant documents including the reports that were relied upon by the PSC in finding that a prima facie case had been proved against him.* The PSC had admitted using the reports in deciding that a prima facie case was proved against the appellant. Learned counsel for the appellant submitted that the Court of Appeal was plainly wrong in saying that non-supply of the documents and reports did not deprive the appellant of his right to know the case against him.

[82] *The right to documents related to the disciplinary proceedings is closely linked to the right for an oral hearing. Both are important elements in fulfilling the right to be heard to be afforded to the officer concerned. We are of the view that, in view of the serious charges levelled against the appellant which ultimately had resulted in him being dismissed from the service, in all fairness, the appellant ought to have been supplied with all the relevant documents and reports requested by him particularly since the disciplinary authority had relied on those documents to decide that a prima facie case had been proved against the appellant, to enable him to make an effective and meaningful defence to the charges. There is a plethora of authorities that deal with the issue.*

[83] Lord Denning in the case of *B Surinder Singh Kanda* had ruled that 'Their Lordships do not think it was correct to let him (referring to the adjudicating officer) have the report of the board of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice'. His Lordship had also stressed that 'whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other'.

[84] It is an established law that the officer concerned must be supplied with those documents which were relied upon by the disciplinary authority in the proceedings against him where the officer had requested for the documents. It is the duty of the disciplinary authority to provide him with the documents (see: *Tay Chai Huat*, *Chai Kok Choi*; and *Raja Abdul Malek Muzaffar Shah*). No one facing a disciplinary proceedings can effectively meet the charges unless copies of the relevant statements and documents to be used against him are made available to him. Without copies of such documents, the officer concerned will not be able to prepare his defence effectively.

[85] The general principles on this issue can be summarised as follows:

(i) concomitant with the right to be heard is the right of a person to know the case made against him;

(ii) he must know what evidence has been given and what statements have been made affecting him; and

(iii) he must be given a fair opportunity to correct or contradict them.

[46] Hence, having due regard to the well-established and well-entrenched principles alluded to in the above mentioned passages from *Adri*'s case, it is relevant and necessary to ask — was the appeal proceedings before the DAC conducted fairly, or was it tainted with fundamental procedural flaws which vitiated the decision of the DAC to uphold the DC's decision to find the appellant guilty of insubordination and downgrading him from Grade VK6 to VK7? Before we answer that question, we shall first deal with some of the vexed questions that came up during the course of the submissions.

A RIGHT TO CROSS-EXAMINE

[47] First, did the appellant have a right to cross-examine witnesses? In *Lembaga Jurutera Malaysia v Leong Pui Kun* [2009] 2 MLJ 36 the Federal Court had ruled that the right to cross-examine a witness is not an inalienable fundamental right under the rules of natural justice, and that each administrative body regulates its own procedure and need not assume the trappings of a court. The Federal Court in *Leong Pui Kun* held:

> [35] Further, the learned judge also held that the respondent had an inalienable fundamental right to cross-examine the complainant which he read into s 15(2) of the Act as the meaning of opportunity to be heard when he said at p 117 of the appeal record:
>
> > Section 15(2)(b) clearly spells out that an opportunity to be heard must be given to the registered engineer against whom the Board intends to make the order. I am of the opinion that the opportunity to be heard would mean that the (engineer) had an inalienable fundamental right to question the person who has complained against him as a professional ...
>
> [36] The above legal propositions of the learned judge are flawed. They are in direct contrast with a long line of established Supreme Court, Federal Court and Court of Appeal authorities that hold that every administrative body is the master of its own procedure and need not assume the trappings of a court. The rules of natural justice do not contain any inalienable fundamental right to cross-examination of a witness, including the complainant (see *Disciplinary Tribunals by JRS Forbes*, 1990, at pp 115–121; *University of Ceylon v EFW Fernando* [1960] 1 WLR 235 (PC)). The rules of natural justice are variable and do not mean adversarial procedures of a court of law or analogous to a court of law ...
>
> [43] It is thus clear from the foregoing authorities that the disciplinary proceedings under s 15(2) of the Act are not adversarial proceedings. They are inquisitorial or investigatory proceedings and they are not inconsistent with the rules of natural justice (see *Jones v Welsh Rugby Union* (The Times, 6 January 1998)). In such proceedings, questions such as burden of proof, calling of witnesses or the need to explain the procedure do not arise in the same way in which they would in proceedings between parties in a suit, for such proceedings do not involve two opposing parties or adversaries before an independent adjudicator. In the instant case, the Act gave the appellant wide powers to regulate the engineering profession, and in doing so, to play an active role in initiating, prosecuting and making a decision in disciplinary proceedings and by virtue of para 2(5) of the Schedule to the Act these powers cannot be delegated. Therefore, the allegation of bias on the appellant's part just because the appellant had acted as accuser and prosecutor and judge is untenable.

[48] The principle which may be gathered from *Leong Pui Kun*'s case is that the rules of natural justice do not include an inalienable fundamental right to cross-examination of a witness (including the complainant). The Federal Court relied on *Fernando*'s case for this proposition. The position which we have

taken is to be found in paras [64]–[80] of this judgment where we have extensively analysed and commented upon *Fernando* and *Kanda.*

EVIDENCE NOT TAKEN IN APPELLANT'S PRESENCE

[49] One of the appellant's principal argument before us was that he was not given an opportunity to be present when evidence was taken in respect of the charges levelled against him and/or to cross-examine the witnesses during the IIC hearing, the IC hearing and/or the hearing before the DAC, and that this thereby infringed the rules of natural justice.

[50] It was of course correctly submitted by learned counsel for the respondents that the target of the judicial review was the DAC's decision and not any prior or intermediate decision of the IIC, IC or even the decision of the DC. From the record, it appears that the appellant and others, were only interviewed by the IIC and later by the DAC. There were no other interviews.

[51] Indeed, it is quite well established that even if there were defects in the initial part of the investigative process leading up to the conclusions reached by the intermediate disciplinary body as in this case, the DC, which concluded that the appellant had failed to exculpate himself from the charge of insubordination, there was ultimately the recourse to the DAC, which could have 'cured' the initial procedural defect, if it had itself conducted the appeal proceedings in accordance with rules of natural justice. See: decision of the Privy Council in *Calvin v Carr*.

[52] It is of course trite that curial intervention by the court in disciplinary proceedings of public bodies is limited to cases where there is a fundamental procedural flaw. Thus, the court will not interfere with the disciplinary body's findings of fact. See: *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 (FC) where the Federal Court stated at para [36]:

> The courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings. The *courts will only intervene in disciplinary cases where there was a fundamental procedural flaw*. The courts cannot exceed its role in cases of this genre as the instant appeal. The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence.
>
> Weighing and assessing the evidence is the function of the disciplinary authority which is the body to which the legislature has entrusted the responsibility of deciding the issue, and not the courts. Hence, the court should approach cases of this genre as the instant appeal in the following way, namely, whether there has been an error in the process or *whether there was procedural irregularity in the decision-making proceedings* leading to the public officer's dismissal.

[53] Thus, as rightly submitted by learned counsel for the respondents, the court will not interfere with and/or wade into the merits of and/or the reasons justifying the decisions of the disciplinary authority (eg DAC) and substitute its own view thereto, save and unless where it is demonstrated that there was procedural impropriety vis a vis the conduct of the disciplinary proceedings against the appellant. And in this regard, it must also be shown that the procedural impropriety had affected the appellant's substantive rights.

[54] Thus, for the respondents it was argued (echoing the judge's conclusions at para [95] of her judgment) that reg 21 of the Third Schedule does not provide for the appellant to be afforded with the right to cross-examine witnesses. Further, the respondents argued that 'additional evidence was obtained by the DAC from other witnesses subject to the appellant's right to be heard, which was afforded to him, when he was called to give oral evidence before the DAC'. Counsel for the respondents referred to the Federal Court's decision in *Leong Pui Kun* and said that the learned High Court judge rightly held that there is no necessity to read 'the right to cross-examine' into the 'right to be heard' under reg 21(3), as every administrative body in a disciplinary action is the master of its own procedure and need not assume the trappings of a court.

[55] In amplification, counsel for the respondents said that the DAC as the administrative body is vested with the power/discretion to initiate, prosecute and decide in disciplinary proceedings, which are not adversarial proceedings. Thus, the said proceedings ought not to be treated as a trial in a court of law. Next, it was contended that in disciplinary proceedings, questions such as burden of proof, calling of witnesses or the need to explain the procedure do not arise in the same way in which they would in a court of law and the rules of natural justice do not contain any inalienable fundamental right to cross-examination of a witness. They are variable and flexible and do not call for adversarial procedures of a court of law, or analogous to a court of law.

[56] In conclusion, counsel for the respondents referred to *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203 (PC) and the decision of the Supreme Court in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 and said that 'so long as the appellant was afforded with ample notice of the accusation made against him; given the opportunity to state his case in written and oral forms; and there was no bad faith in the administrative action, then there can be no breach of natural justice, which is the case here'.

[57] In so far as the substantive merits of the allegation against the appellant is concerned, the judge dealt with the same in the following paragraphs of her judgment:

[100] The applicant proceeded further in questioning the merits of the DC and the DAC's decisions where he has alleged that the DC's and the DAC's decisions were unreasonable as they did not take into consideration relevant considerations. It is the applicant's stand that he was authorised to sign the said agreements and he relied on several resolutions made by the Board in its meetings. The applicant contends that the Board and other relevant bodies of the first respondent had knowledge of the said agreements and/or the said projects. He further claims that he was never advised by the officers of the first respondent in particular the Registrar (ie the Secretariat of the Board) of the need to obtain the Board's approval and that his action was in violation of the Board's resolutions.

[101] It must be emphasised that once the court is satisfied that there is no procedural flaw in the decision-making process, it cannot interfere with the merits of the decision of the disciplinary authority. In exercising its supervisory jurisdiction, the court is not entitled to substitute its own view.

[102] In any event, from the affidavits filed by the respondents and submissions on their behalf, their response as to the applicant's allegations as to the merits relating to the decisions made by DC and the DAC has been explained in extenso and suffice for this court to summarise in the following paragraphs.

[103] In regards to the applicant's allegation that he had the relevant mandates and authorisations by the Board to enter into the said agreements, it is the respondents' stand that the DC/DAC had relied on the Board's resolution in its 99th Meeting held on 10 December 2013 wherein the Board directed that every development project involving the usage of UPM land, ought to be discussed beforehand by the LADC before it is presented to the Board for consideration and approval. According to the respondents, the Board's resolution at its 99th Meeting is a specific directive of the Board, prescribing specifically the procedures which must be complied with prior to the signing of any agreement which pertains to any development project involving the use of UPM land.

[104] It is pointed out to the court that the said projects were, inter alia, listed out as projects under Master Plan of Usage of Land ('Pelan Induk Guna Tanah') in the Board Paper LPU 72/201342, which was then presented to and considered by the Board at its 99th Meeting prior to the passing of the Board's resolution. According to the respondents, the Board's resolution at its 99th Meeting would apply to the said projects, in that these are agreements which require prior Board approval. The Applicant, having been present at the 99th Meeting, would necessarily be well aware of this fact.

[105] While it is not disputed that the applicant is authorised to sign agreements on behalf of the first respondent, the respondents took the position that it does not entail that the applicant has a blanket overriding power/discretion to do so without first obtaining the approval of the Board. In fact, according to the respondents, nowhere in the resolution arrived at the Board's 94th Meeting authorised the applicant to sign the said agreements without Board's approval. It merely deals with identifying a suitable developer. In addition, the respondents submits that the fact the applicant later sought to have the said agreements ratified by the Board shows that he is well aware that the approval of the Board is compulsory for such matters.

[106] As for the applicant's contention that he was authorised to sign the said agreements based on the resolutions of the Board's 73rd and 91st Meetings ('ROE Meetings'), it is the respondents' position that the applicant, being the Chairman of the MC, did not discuss and/or obtain the approval of the MC in relation to the said projects prior to signing the said agreements. He approached the MC for their approval of the said projects only after they were signed. Further, all the pre-conditions resolved by the Board at the ROE Meetings, which would entitle agreements to be signed before obtaining the Board's approval (but would be ratified thereafter) have not been fulfilled, in particular:

(i) the said agreements do not comply with the strict prescribed format of the ROE;

(ii) the said agreements do not fulfil the fundamental principles contained in the ROE;

(iii) the applicant have failed to prove that the said agreements were certified by UPM's Legal Advisor's Office prior to the signing of the said agreements; and

(iv) the said agreements have not only affected UPM interests, but have also posed legal risks to UPM.

[107] It is the respondents' stand that the applicant had not produced any evidence to support his contention that the Board had any knowledge of the terms of the said agreements until after the said agreements were signed. It is highlighted to the court that the documents referred to by the applicant to wit, Minutes of the Development and Asset Management Committee, the Freestyle Agreement and the Board paper prepared by the Development and Asset Management Committee relating to the status of the Medical City Project were merely pre-discussions regarding the implementation of the said Project where there does not appear to be any acknowledgement or express approval by the Board regarding the signing/execution of the said agreements in any of the documents relied on by the applicant.

[58] It was submitted for the respondents that the DAC decision may be impugned via judicial review proceedings, but this ought to be limited only to the decision-making process and not on the merits of the decision itself, where disciplinary proceedings are concerned.

[59] The agreements were presented to the Board for ratification during the 109th Board meeting on *15 December 2015*. At this meeting, the Board concluded, inter alia, that the appellant's act of executing the freestyle agreement was in non-compliance with the proper procedure, ie obtaining the prior approval of the Board and amounted to a wrongdoing and as a result, the Board proceeded to reprimand ('teguran serious') both the appellant as well as the 'Penasihat Undang-Undang Universiti' (Dr Rozanah) for failing to take the proper steps to safeguard the interests of the University.

m) berpandangan bahawa perbuatan atau tindakan yang tidak mematuhi peraturan yang berkuatkuasa serta membelakangkan ketetapan Lembaga adalah suatu

kesalahan, dan sehubungan dengan ini, *Lembaga memberi teguran serius kepada Naib Canselor yang telah menandatangani perjanjian tersebut tanpa mendapat persetujuan Lembaga terlebih dahulu dan juga kepada Penasihat 'Undang-Undang Universiti yang tidak mengambil langkah-langkah yang sewajarnya* untuk menjaga kepentingan universiti dalam perkara ini.

DR ROZANAH'S ROLE

[60] In the IIC report which was presented to R1's Board, the following matters were raised or noted vis a vis Dr Rozanah. They are as follows:

4.3 Dalam sidang yang kedua (15 Jun 2016) Jawatankuasa telah memanggil sekali lagi Puan Zainora binti Abdul Talib dan kemudiannya Jawatankuasa juga memanggil Profesor Madya Dr Rozanah binti Abdul Rahman, Penasihat Undang-Undang Universiti.

4.4 Dalam sidang yang ketiga (8 November 2016), Jawatankuasa telah memanggil:

i. Profesor Dato' Dr. Mohd Fauzi bin Ramlan

ii. Profesor Madya Dr Rozanah binti Abdul Rahman

...

5.1 Hasil daripada siasatan yang dijalankan ke atas tiga (3) pegawai yang dikenalpasti dalam kes ini adalah Profesor Dato' Dr. Mohd Fauzi bin Ramlan, Encik Zulkiflee bin Othman dan Profesor Madya Dr Rozanah binti Abdul Rahman. Dapatan dan penemuan siasatan:

a. Telah menandatangani perjanjian antara Universiti Putra Malaysia (UPM) dengan Freestyle Development Sdn. Bhd. bagi pembangunan guna tanah universiti seluas lapan puluh enam (86) ekar di lot H.S (D) 13948, P.T.535 Mukim Kajang, Daerah Ulu Langat, Selangor tanpa mengikut prosedur yang berkuatkuasa;

b. Kandungan perjanjian tersebut yang dianggap meletakkan UPM dalam risiko yang tinggi dan tidak memihak kepada Universiti Putra Malaysia.

...

5.3 Jawatankuasa juga merujuk kepada mesyuarat Lembaga Pengarah Universiti (Minit 99/12 (e) juga telah membuat ketetapan supaya setiap projek pembangunan yang melibatkan tanah UPM hendaklah terlebih dahulu dibincang oleh Jawatankuasa Pembangunan Tanah dan Aset UPM, sebelum dikemukakan ke Lembaga Pengarah Universiti untuk pertimbangan dan kelulusan.

...

Keputusan

5.6 Jawatankuasa bersetuju bahawa, dengan merujuk kepada peruntukan Perlembagaan Universiti, ketetapan yang telah dibuat oleh Lembaga Pengarah Universiti dan juga Garis Panduan Kerjasama Projek Awam dan Swasta, adalah didapati bahawa Profesor Dato' Dr. Mohd Fauzi bin Ramlan telah menandatangani

perjanjian antara Universiti Putra Malaysia dengan Freestyle Development Sdn. Bhd., walaupun projek tersebut tidak mendapat kelulusan Jawatankuasa Aset dan Tanah Universiti, telah diingatkan oleh Pejabat Penasihat Undang-Undang mengenal ketidakaturannya, tidak mendapat kelulusan Lembaga Pengarah Universiti, tidak mendapat persetujuan Kementerian Pendidikan Tinggi dan Unit Kerjasama Awan Swasta (UKAS) dan ini jelas menunjukkan perjanjian telah dilaksanakan secara tidak teratur dan melanggar semua peraturan yang berkuatkuasa.

....

5.10 Bersetuju Profesor Dato' Dr. Mohd Fauzi bin Ramlan dan Encik Zulkiflee bin Othman telah didapati tidak mematuhi prosedur yang berkuatkuasa dan boleh dikenakan tindakan.

[61] Hence, it is relevant to ask — in the interview with the IIC, did Dr Rozanah implicate or exonerate the appellant? It seems from the tone of what was stated in para 5.6 of the IIC report that the appellant was advised by the Office of the Legal Adviser as to the irregularity (*ketidakaturanya*) of the agreements but clearly this is not the stand taken by Dr Rozanah when she appeared before the DAC on 28 June 2019 where she exonerated the appellant by stating that there were previous instances where agreements were executed first, and later sent to the Board for ratification.

[62] The important issue here is that the appellant was not privy to the IIC report and hence was not aware of what Dr Rozanah had said to the IIC, and was not present when she testified (*via WhatsApp video call*) before the DAC.

CURING THE INITIAL DEFECT

[63] A key principle laid out by Lord Wilberforce in *Calvin v Carr* is that procedural defects in an initial inquiry can be 'cured' by a subsequent appellate process. Thus, if an internal/domestic appeal is fairly and properly conducted, then that appeal could possibly cure the initial procedural defect. It follows that the court must ultimately evaluate the fairness of the entire disciplinary process to determine whether any earlier procedural defect was 'cured' by the appellate process.

[64] In this regard, although the respondents contended that the IIC was just a fact-finding or fact-gathering committee and was not strictly, a part or component of the UPM's disciplinary process which is regulated by the Act, it nevertheless seems quite clear that the IIC was a key aspect of UPM's investigative process and several witnesses including the appellant and Dr Rozanah were questioned. The appellant was totally in the dark and did not know what Dr Rozanah or the others had said to the IIC. But it is clear that she had said or suggested something to the effect that the appellant was advised

that the agreements were procedurally irregular. It does not appear to be the case that any other 'in-person' interviews were conducted, apart from the interview on 28 June 2019 before the DAC.

[65] The appellant has also complained that he was not given documents which were requested and was not privy to the evidence of the others who were questioned. In so far as documents are concerned, it seems that UPM had responded to say that he could not be given everything that he had asked for as some of the documents were 'confidential'. But he was directed to make the request to the Chairman of UPM's Board. The appellant did not make any request to the Chairman of UPM's Board. In any case, in so far as the documents are concerned, it is quite apparent that the appellant was not really hampered or hindered in giving his response to the charge of insubordination as he had furnished a fairly robust response to the charge that was levelled against him.

[66] Thus, even if there may have been defects in any of the stages of the disciplinary process, IIC, IC, DC, ultimately it is the procedure and proceedings before the DAC that really matters. Hence, following the principle by Lord Wilberforce in *Calvin v Carr*, we take the view the DAC proceedings, provided that it was conducted in accordance with the rules of natural justice would or may have the effect of curing any earlier defect in the disciplinary process. As such, the focus now is on the DAC and the events that transpired there.

[67] From the record it is obvious that the appellant and others had testified before the DAC. In particular, Dr Rozanah had testified before the DAC. But again, the testimony of the witnesses were taken in the same way as was done before the IIC — the witnesses were interviewed without the presence of the appellant and he did not know what they had said. He was not given the minutes of the interview to know what the others had said. Thus, the same defective procedure was also adopted by the DAC where the evidence before the DAC was taken without the presence of the appellant. He did not know what was said by each of the witnesses who testified before the DAC. Hence, he had no opportunity of clarifying, or if necessary, to rebut or contradict the evidence of any of the witnesses. According to counsel for the respondents, the proceedings before the DAC were in accord with the rules of natural justice and had complied with reg 21(2) and (3) of the Third Schedule of the Act which read as follows:

> (2) The Disciplinary Appeal Committee shall decide every appeal solely on the merits of the grounds of such appeal *without admitting any further statement or additional evidence.*
>
> (3) Notwithstanding subparagraph (2), the Disciplinary Appeal Committee *may, if it thinks just and necessary, and subject to the officer's right to be heard, request for any*

A *further statement or additional evidence from any other person.* (Emphasis added.)

FERNANDO

B **[68]** Hence, we come back to the overarching question — was the DAC proceedings conducted fairly and in accordance with the rules of natural justice so that it could cure the earlier defect in the investigation before the IIC per *Calvin v Carr*. This neatly takes us to the case of *Fernando* which was endorsed by Federal Court in *Leong Pui Kun* and heavily relied upon by the respondents. The facts of the case are as follows. Mr Fernando ('the plaintiff') was a student C in the University and he sat for the final examination for the Bachelor of Science Degree course. Under the General Act of the University, a student may be suspended indefinitely from sitting for any examination if he/she is found to have 'acquired knowledge of the nature or the substance of any question or the D content of any paper'. A fellow student, Ms Balasingam ('Ms B') lodged a complaint that the plaintiff had acquired knowledge of a German passage in one of the examination papers before taking the examination. The Vice-Chancellor formed a Commission of Inquiry. The University wrote to Mr Fernando and he attended before the Commission. It was made clear to the E plaintiff by way of a letter what the charge was and he was given an opportunity to state his case. The plaintiff gave evidence before the Commission.

[69] The Commission questioned (in addition to the plaintiff) Ms B and a number of other persons including various lecturers and students, but none of F them in the presence or hearing of the plaintiff. The plaintiff (Fernando) did not ask that he should be allowed to question any of these witnesses or that he should be present when others were interviewed. The Commission found that the allegation made by Ms B against the plaintiff was true and reported accordingly to the University's Board of Discipline and the latter found the G plaintiff guilty of an examination offence and suspended him indefinitely from all University examinations.

[70] The plaintiff brought an action against the University for a declaration H to the effect that the decision was null and void on the ground that the inquiry was not conducted in accordance with principles of natural justice. The High Court dismissed the action. The plaintiff appealed to the Supreme Court of Colombo which allowed the appeal and granted the declaration sought by the plaintiff. The University appealed to the Privy Council.

I **[71]** The Privy Council took the view that the Vice-Chancellor was not bound to treat the matter as a trial, but could obtain information in any way he thought best, and it was open to him, if he thought fit, to question witnesses without inviting Mr Fernando to be present, but a fair opportunity must have

been given to him to correct or contradict any relevant statement to his prejudice.

[72] The Privy Council concluded that the last condition had on the facts of this case been complied with, in that Mr Fernando had, by letter from the Vice-Chancellor and at interviews with the commission of inquiry, been adequately informed of the case he had to meet, and had been given at the interviews an adequate opportunity of meeting the case alleged against him.

[73] According to the Privy Council, the fact that the Commission failed to volunteer the suggestion that Mr Fernando might wish to question the person who had made the allegation against him (Ms B) — or to offer her to be cross-examined by Mr Fernando — was not an omission sufficient to invalidate the proceedings of the commission as failing to comply with the requirements of natural justice in the circumstances of the case. According to the Privy Council, the mode of procedure adopted by the Vice-Chancellor in bona fide exercise of the wide discretion as to procedure reposed in him under cl 8 sufficiently complied with these requirements of natural of justice.

[74] In *Fernando,* Lord Jenkins, giving the advice of the Privy Council, quoted with approval at ([1960] 1 WLR 223 at p 232) the following words of Harman J, as he then was, in *Byrne and Another v Kinematograph Renters Society Ltd and Others* [1958] 2 All ER 579:

> What then are the requirements of natural justice in a case of this kind? First, I think that the accused person should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not myself think that there really is anything more.

[75] The fourth ground of Fernando's complaint comprised the substance of the plaintiff's case and was to the effect that the evidence of the various witnesses who appeared before the commission of inquiry, including the evidence of Ms B, was taken in the absence of the plaintiff (Mr Fernando), who was not aware of what evidence was led against him, and that in the circumstances one of the essential elements of natural justice was not observed, in as much as the plaintiff was not aware of the case he had to meet. Essentially the plaintiff claimed that he was not given the opportunity to cross-examine Ms B and was unaware of what she had told the Commission. Now Ms B had been interviewed by the Vice-Chancellor and the plaintiff was told the gist of what she had said in two interviews and via the University's letter. The Privy Council noted the following:

> The university's contention is that this condition, which resolves itself into the two requirements that the plaintiff should be adequately informed of the case he had to

meet, and given an adequate opportunity of meeting it, was complied with in its first branch by the letter of May 16, 1952, and what plaintiff was told at the first interview on May 21, 1952, and in its second branch by what passed at that interview and at the second interview on June 3.

As to what took place at the two interviews, the trial judge accepted the evidence of the Vice-Chancellor in preference to that of the plaintiff. The Vice-Chancellor's evidence, and indeed the plaintiff's own admission, *make it abundantly plain that at the outset of the first interview the plaintiff was told that Miss Balasingham had made this charge against him and the nature of the charge was explained to him in detail.*

[76] In the same case the Privy Council had opined that if Mr Fernando had requested that he be allowed to cross-examine Ms B and this was refused, then perhaps there might be some ground to conclude that there was a denial of the right to cross-examine and thus a breach of the *audi alteram partem* component of the rules of natural justice. By taking that stand, the Privy Council was implicitly postulating that the plaintiff had by his omission, 'waived' his right (if he had one) to cross-examine the complainant. We will deal with 'waiver' in the later part of this judgment. The Privy Council upheld the decision of the trial judge who preferred the evidence of the Vice-Chancellor over that of the plaintiff in circumstances where the Vice-Chancellor's position was that the plaintiff was told and therefore, he knew exactly what Ms B had said to the Vice-Chancellor during her interview with him. As such, the appeal was allowed and the trial judge's decision was restored. Hence, the plaintiff's action to nullify the decision of the University was dismissed.

KANDA

[77] The case of *Fernando* should be contrasted with *Kanda's* case. In *Kanda's* case, the plaintiff (Kanda) was an inspector in the Malayan Police Force. He was dismissed from service. The officer who led the inquiry into the charge of misconduct against Kanda was a person known as the adjudicating officer ('the AO'). Kanda was unaware that a report of the Board of Inquiry had been given to the AO.

[78] The report of the Board of Inquiry contained a severe condemnation of Kanda. It was sent to the AO before he sat to enquire into the charge. He read it and had full knowledge of its contents. But Kanda never had it. He never had an opportunity of dealing with it. Indeed, he never got it until the fourth day of the hearing of the action in the High Court.

[79] The High Court per Rigby J declared Kanda's dismissal as null and void and said, 'In my view, the furnishing of a copy of the findings of the Board of Inquiry to the adjudicating officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff,

amounted to such a denial of natural justice as to entitle this court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal'. The Malayan Government succeeded in their appeal to the Federal Court. Kanda appealed to the Privy Council. The Privy Council (per Lord Denning) agreed with Rigby J's finding and allowed Kanda's appeal and stated at pp 172–173:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, LC in *Board of Education v Rice* [1911] AC 179 18227 TLR 378 down to the decision of their Lordships' Board in *Ceylon University v Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 (PC). It follows, of course, that *the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.*
>
> The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. *The court will not go into the likelihood of prejudice. The risk of it is enough*. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing. Instances which were cited to their Lordships were *Re Gregson* (1894) 70 LT 106, *Rex v Bodmin Justices* [1947] KB 321; [1947] 1 All ER 109 and *Goold v Evans* [1951] 2 TLR 1189 to which might be added *Rex v Architects Registration Tribunal* [1945] 2 All ER 131; [1945] 61 TLR 445 and many others.

[80] Having regard to the principles stated above, we are of the view that the Privy Council's approach to natural justice in *Fernando* cannot be reconciled with the principles of procedural fairness. Indeed, in as much as Mr Fernando was not given any opportunity to listen to what Ms B had to say and an opportunity to cross-examine her or at the very least — the opportunity to articulate his version so as to rebut or contradict her testimony, we would say (with all due respect to the Privy Council) that the case of *Fernando* is an anomalous departure from the now entrenched requirement (per *Kanda*) which robustly reaffirmed the *audi alteram partem* principle that reliance on undisclosed evidence constitutes a fundamental breach of natural justice and that a person must be afforded an opportunity to know and meet the case against them. Indeed, there is no clear unequivocal evidence that Mr Fernando was even shown Ms B's testimony other than the Vice-Chancellor's testimony at the trial that he had disclosed to Mr Fernando, what Ms B had told him.

[81] It is said that Mr Fernando was told of the charge and of the case that he had to meet via the Vice-Chancellor's letter to him. But the critical issue is — Mr Fernando was not present when Ms B was interviewed by the Vice-Chancellor. If he was present then certainly, he would have had to

opportunity to rebut or contradict her evidence. But he was denied that opportunity. Here it is necessary for us to refer to the judgment of Weerasooriya J in *Fernando v The University of Ceylon* [1956] NLR 265 where the learned judge of the Supreme Court of Colombo analysed the facts and circumstances of the case in considerable detail and observed at pp 270–271:

> *The full particulars of the allegation made by Miss Balasingham*, as set out in the report P11, *do not seem to have been made known to the plaintiff* either at the inquiry on the 21st May or on the only other occasion when he was questioned, namely, the 3rd June, 1952. The plaintiff was afforded *no opportunity at any stage of cross-examining Miss Balasingham, nor was even the gist of her evidence communicated to him. No record of the proceedings was kept by the committee, nor does it appear that any member of it made notes of the evidence adduced.*
>
> The substance of the evidence given by those other witnesses who were questioned (which evidence was partly in favour of the plaintiff and partly against him) was not communicated to him. Even with regard to the only specific allegation of Miss Balasingham with which the plaintiff was confronted on the dates on which he was questioned by the committee, namely, that she had copied eight or nine German words from a book in the plaintiff's possession which words occurred in the German passage in P3, no particulars appear to have been furnished to the plaintiff as regards the date, time or place of the incident.
>
> ... I have little hesitation in forming the opinion that, irrespective of the question whether the committee of inquiry or the Vice-Chancellor were performing a quasi-judicial or purely administrative function in holding the inquiry, the procedure adopted was unfair to the plaintiff in that it deprived him of a reasonable opportunity of testing the truth of the case against him or of presenting his defence and explaining various matters in regard to which adverse inferences were drawn against him ...

[82] The Federal Constitution is the supreme law of the land. In endorsing the legal principle enunciated in the *Kanda*'s case, we are mindful of the court's duty to interpret case law harmoniously with our Federal Constitution because art 160(2) of the Federal Constitution constitutionally defines 'law' to include common law.

[83] Procedural fairness is enshrined in the following provisions of our Federal Constitution — art 5(1) (right to liberty), art 8(1) (equality before the law), and art 135 (restriction on dismissal and reduction in rank for public servants). Specifically, art 135(2) of the Federal Constitution provides that no member of public service shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

[84] In the seminal decision of *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2010] 2 AMR 231 (FC), the Federal Court held that the rules of natural justice, which is the procedural aspect of the rule of law, is an integral

part of arts 5(1) and 8(1) of the Federal Constitution. As per Gopal Sri Ram FCJ (as he then was) in para [17]:

> We also find support for the view we have expressed from the judgment of Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, where, when dealing with arts 9 and 12 of the Singapore Constitution which are identical to arts 5 and 8 respectively he said:
>
> > In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.

[85] Similarly, the Federal Court in the case of *Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2011] 5 MLJ 465; [2012] 1 CLJ 448; [2011] 5 AMR 688 (FC), described that procedural fairness is a fundamental right guaranteed in our Federal Constitution. In para [5] of the judgment, Richard Malanjum CJSS (as he then was) held that:

> Accordingly, observation of procedural fairness that is closely connected to a fundamental right, for instance, the right to life (art 5(1)) as enshrined in our Federal Constitution is of paramount importance. Indeed right to life has been interpreted to include the right to livelihood. And it has been said that 'income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental' (see *Delhi Transport Corporation v DTC Mazdoor Congress & Ors* [1991] Supp 1 SCC 600) and referred to by our Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771. Hence, failure to observe such procedural fairness would tantamount to a breach or aiding a breach of such fundamental right.

[86] In our view, the pronouncements by the Federal Court in *Lee Kwan Woh* and *Yusof bin Sudin* collectively establish that procedural fairness ought to be afforded constitutional status and significance, which further fortifies the reasons why we are not able to agree with the case of *Fernando*. As alluded to earlier, the decision in *Fernando* marks a significant departure from the *audi alteram partem principle*. It follows that we are at liberty to depart from this case if the decision does not accord with the constitutional spirit of our Federal Constitution, specifically arts 5(1) and 8(1).

[87] In all the circumstances and based on the jurisprudence enunciated by the Federal Court on the paramount requirement for the observance of procedural fairness particularly when it involves the right to livelihood, per *Lee Kwan Woh* and *Yusof bin Sudin* we are inclined to agree with the views articulated by Justice Weerasooriya of the Supreme Court in *Fernando*'s case. As such, we feel somewhat constrained to say that the decision of the Privy Council in *Fernando* might well have been different if it had been decided after *Kanda*'s case.

[88] Before we conclude, we think that it would be quite apt for us to refer to the following passages from the 3rd Edition of Prof MP Jain's book, 'Administrative Law of Malaysia and Singapore', where the learned author had expressed doubts as to the correctness or fairness of the decision in *Fernando*. At p 315, the author commented on whether it was appropriate for a disciplinary authority to rely on an interview between the decision maker and the party affected and said:

> At times, an interview between the decision-maker and the party affected may be regarded as sufficient compliance with natural justice. For example, in *Mahadevan v Anandarajan*, the Principal interviewed the student alone and 'taxed him with a number of previous instances of misconduct and asked him to explain them'. He then decided to expel the student after hearing his 'explanations and excuses'. The course adopted by the Principal was held not to be unfair in relation to the student. Similarly, in *University of Ceylon v Fernando*, the student was interviewed twice by the Vice-Chancellor before being suspended from all university examinations for an indefinite period. The procedure was held to be in accord with natural justice as the Privy Council was satisfied that an adequate opportunity was given to the student to state his case. In India, in *Fedco v Bilgrami*, the licence of an importer, who was accused of having obtained it by fraud, was cancelled after a personal interview between him and the concerned officer, and the court upheld the procedure adopted.
>
> Although the courts have sustained such a hearing procedure, in reality the efficacy thereof remains open to grave doubt. Is the person affected really in a position to offer any worthwhile defence of his conduct at a private interview? What transpires at such an interview remains doubtful. It is the word of one person against that of the other and usually the courts rely on what the concerned official says happened at the interview. For example, in *Fernando*, for what took place at the interview, the court 'accepted the evidence of the Vice-Chancellor in preference to that of the plaintiff. Similarly in *Mahadevan and Fedco*. The consequences of the action taken against the concerned students were quite serious in *Mahadevan and Fernando*, as the whole future career of the concerned students was in danger of being blown over. In these cases, judicial attitude appears to be too much coloured by the nature of the subject-matter, *viz* disciplinary proceedings. *In a case where the effect of the decision may be serious to the concerned person, the courts ought to insist on somewhat more formal procedure.* (Emphasis added.)

[89] Then at p 325, the author discussed the issue of the affected party's

failure to ask for cross-examination and of evidence being taken without the affected person being present. In this regard, the author, Prof Jain said:

> Waiver
>
> In *Fernando*, the argument of the appellant that he had not been given an opportunity to cross-examine witnesses testifying against him was rejected by the Privy Council on the ground that he never claimed such a right. The Privy Council stated that the objection would have been more formidable if he had asked to be allowed to question the essential witnesses and his request had been refused. But he never made such a request. The omission on the part of the university to tender the witnesses unasked for cross-examination could not be regarded as sufficient to invalidate the proceedings on the ground of failure to comply with natural justice. A question may, however, be raised whether it was reasonable in the circumstances to make the student's right to cross-examine witnesses contingent on his taking the initiative in making such a request when he was not being represented by a professional lawyer. Since *Fernando*, the position seems to have changed in Britain. As Lord Edmund Davies has observed in *Bushell*, '[t]here is a massive body of accepted decisions establishing that natural justice requires that a party be given an opportunity of challenging by cross-examination witnesses called by other parties on relevant issues'.

[90] And in so far as the Privy Council had suggested that there was no breach of the rules of natural justice because Mr Fernando did not ask to cross-examine Ms B, we think that this can hardly be regarded as a situation which accords with the right of an accused person to defend himself before a disciplinary authority. We do not think for a moment that there is any room for 'waiver' or 'acquiescence' to operate within the confines of the rules of natural justice.

[91] Indeed, in *Tan Boon Chee, David v Medical Council of Singapore* [1980] 2 MLJ 116 (HC), Mr Justice Choor Singh had relied on the decision of Sir Jocelyn Simon P (as he then was) in *Mayes v Mayes* [1971] 1 WLR 679 at p 684 where the following principle was enunciated: '… I am inclined to think that the general principle is that a rule of natural justice which goes to the very basis of judicature (as I think this does) cannot be waived. You cannot by waiver convert a nullity into a validity'. Mr Justice Choor Singh opined that if a breach is fundamental, then it cannot be waived.

[92] Thus, on the facts in that case the appellant doctor and his legal counsel had not raised any objection to the way the hearing was being conducted — where some members of the Council were walking in and out of the proceedings and did not hear the full evidence that was being recorded and all the submissions that were being made. And because of their non-objection, the Council argued that by allowing the proceedings to go on, the appellant had disentitled himself to raise any objection because of his 'waiver and

approbation'. This was rightly rejected by the Mr Justice Choor Singh.

[93] Likewise, applying the *Mayes* principle to the facts of the present appeal, it matters not one jot that the appellant had not requested to be present when others were testifying, or to cross-examine these other witnesses.

[94] Indeed, he may not even have been aware that he could ask for cross-examination. Or, the proceedings might have been so overwhelming that he might have been reluctant to request that he should be present when the others testified before the DAC and that he be given an opportunity to rebut, contradict or perhaps clarify what they had said to the DAC. Indeed, given that the appellant was appealing before the DAC to overturn the DC decision where he had failed to exculpate himself, we think that he carried a heavy burden when he appeared before the DAC. Thus, it follows that in order to exculpate himself, the appellant had a right to be present when others testified before the DAC and if necessary, to cross-examine or at the very least to offer a rebuttal or to contradict what others had to say.

[95] As far as we are concerned, it is clear as night follows day, that the appellant had a fundamental and inalienable right to be present when evidence was being taken so that he would have an opportunity to seek clarification, rebut or contradict any adverse evidence that may be made against him. Indeed, we would go so far as to say that the DAC, being 'the master of their own procedure', were duty bound to ensure that the proceedings are conducted fairly.

[96] Hence, the DAC should have asked the appellant to remain in the hearing room after he had testified so that he could listen to what the others had to say, and if he so desired, to give him a chance to clarify, rebut or contradict the evidence assuming it is adverse to him.

[97] Before we leave the topic of waiver, we ought for the sake of completeness, state that in *Leong Pui Kun* the Federal Court did accept that waiver could apply such that it neutralised any complaint of irregularity in the proceedings. This is how the Federal Court dealt with waiver:

> [55] With regard to the learned judge's findings of bias on the appellant by the presence and participation of the secretary at the hearing, the learned judge was clearly in error when he failed to take into account the material fact that the respondent not only consented to the appellant's secretary, Ir Dr Judin bin Abdul Karim, asking questions (at p 988 of the appeal record), the respondent's counsel himself invited the secretary to ask questions ('V (counsel): Dr Judin, I don't know whether you want to ask anything?' at p 993 of the appeal record). The respondent and his counsel did not at any time take any objection whatsoever to the presence or participation of the secretary or to the line of questioning or the comments made by

him. Thus, the respondent by his or his counsel's conduct and their failure to object consented or acquiesced to the presence and participation of the secretary in the disciplinary proceedings.

The respondent had therefore waived any right to object to any irregularity in the proceedings by virtue of the presence or participation of the secretary (see *Najar Singh v Government of Malaysia & Anor* [1974] 1 MLJ 138 (FC) at p 141; *University of Ceylon v EFW Fernando* at p 235).

[98] But it is clear that the case of *Mayes v Mayes* and Justice Choor Singh's decision in *Tan Boon Chee, David v Medical Council of Singapore* [1980] 2 MLJ 116 (HC), were not drawn to the attention of the Federal Court. We are confident that had the Federal Court been apprised of these cases, the outcome may well have been different. We therefore reject the suggestion that waiver can apply to overcome a fundamental procedural breach of a domestic disciplinary appellate process.

[99] As we mentioned earlier, Dr Rozanah seemed to have given testimony to the DAC which is aligned with the appellant's position. Now, if the appellant was present and had heard what she had said, then he might have asked her probing questions to augment and fortify his position accordingly. But he was not given that chance or opportunity. Here, we are told by counsel for the respondents (rather surprisingly) that even though Dr Rozanah's evidence was in favour of the appellant, such testimony is irrelevant as it goes to the merits and when it comes to merits, the courts should take a 'hands-off' approach. With all due respect to counsel, we are unable to see the logic in this proposition. If Dr Rozanah's evidence (favouring the appellant) is irrelevant, then how did the testimony of the other witnesses become relevant? Or is it the respondents' position that it is relevant only if it implicates the appellant?

[100] In any case, Haslida's affidavit confirms that the DAC had taken into account, all the evidence, including the evidence of the witnesses. Hence, it is relevant to ask — *why was Dr Rozanah's evidence not accepted*? Unfortunately, the DAC's minutes for the hearing on 28 June 2019 shows that the DAC has not given reasons for their decision to uphold the DC's decision which found the appellant guilty of the charge of misconduct (insubordination). Apparently, the DAC is under no duty to furnish reasons. That may well be the case, but that cannot be taken as an omnibus statement and situations may arise as in the present case, where an important witness, in the person of the former legal advisor who testified in favour of the appellant and the appellant is entitled to know why her exculpatory testimony did not yield a successful outcome for the appellant.

[101] No doubt the DAC are entitled to reject Dr Rozanah's testimony but before they do that they must give reasons why they had rejected her testimony

(*if that is what they did*). Before we leave this point, we would like to deal with the question — how was the appellant prejudiced by the breach of natural justice or to put it bluntly, what did the appellant lose? The question here is whether the appellant suffered prejudice as a result of the breach of natural justice.

[102] In *Lembaga Jurutera Malaysia v Leong Pui Kun* [2009] 2 MLJ 36, the Federal Court held:

> *In considering whether there is any denial of natural justice, the court is to look at the form and the substance of the hearing conducted by the appellant/and closely to see whether in any substantial respect there could be said to be a denial of natural justice*, but the appellant's proceedings must not be looked at as would the proceedings of a court of law, what is more important is not the form but the substance. The procedural breach is insufficient to give an applicant a remedy in the court unless there is something of substance that had been lost resulting from the breach. The applicant must have suffered prejudice as a result of the breach of natural justice (see *Tanjong Jaga*). (Emphasis added.)

[103] And in *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124, the Supreme Court held as follows:

> It might well therefore be, in the light of this and the decision in *Carter v Bradbeer*, that even if the appellant was accorded a hearing on this aspect as he claims he was entitled to, it would have made no difference. I would refer in this regard to my judgment in *Merdeka University* (at p 368):
>
> > In *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 Lord Reid (at p 1582) thought that if it could be clearly demonstrated that whatever the appellant in that case said could make no difference, that 'might be a good answer', and Lord Wilberforce said (at p 1595): 'A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain'. This seems to imply that the discretion to refuse a remedy may be exercised when the court judges that natural justice would make no difference or that there was no prejudice. (Emphasis added.)

[104] The principle which can be culled from the abovementioned cases is that in certain circumstances, natural justice would make no difference and/or that there was no prejudice to the accused person. Hence, in some instances apparently a decision of an administrative body will be immune from being declared null and void despite any breach or violation of the rules of natural justice as the outcome is a foregone conclusion. The logic behind this theory is that there is nothing that the accused person can say which would change the outcome. We do not feel impelled or convinced to readily embrace this

principle which goes against the very core or essence of the *audi alteram partem* rule.

[105] Indeed, we are of the view that this approach ought to be discarded as being anomalous or as being the very antithesis of a fair hearing. Here, it is apt for us to refer to the judgment of Mr Justice Megarry in *John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John* [1969] 2 All ER 274 at p 309 which reminds us that the right to be heard should not be jettisoned willy-nilly or sacrificed on the basis that the outcome will not change. Indeed, in light of Dr Rozanah's testimony before the DAC, it can hardly be contended that this is an 'open and shut case' where the outcome is a forgone conclusion.

[106] This is how Justice Megarry put it:

> It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start'. Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

SUMMARY

[107] In summary, our conclusions/decision on the several issues at hand are as follows:

(a) regardless of whether the IIC was a properly constituted investigating body, it was nevertheless formed pursuant to the Board's general powers to form a committee, although it was a not a body which was contemplated by the relevant statutory provisions under the Act. But, the defects in the manner in which the IIC had conducted their investigations, and even assuming (without concluding) that there were also defects in the way in which the IC and the DC had conducted their respective proceedings, the end result is that all of these defects are not such that they could *ipso facto* vitiate the ultimate decision by the DAC, as these defects could ultimately have been 'cured' by the appellate process before the DAC (see *Calvin v Carr*) (provided of course that the

appeal process is conducted fairly and in accordance with the rules of natural justice);

(b) hence, the imperative and necessary question is whether the DAC proceedings were conducted fairly (per *Rohana*'s case)? Having regard to what had transpired before the DAC, we are of the view that it was imperative for the appellant to have been present when the evidence of the other witnesses was taken or recorded by the DAC so that the appellant would have been made aware of what each of them had said, and he would have been in a position to seek clarification, rebut or contradict what each of them had said;

(c) in the case of Dr Rozanah's testimony — if the appellant was aware that she supported his conduct, then he might have asked questions to reinforce or fortify his position to the point where the DAC may well have concluded that he was not guilty of wrongdoing (insubordination) or he might have been let off with a warning;

(d) if the DAC had looked at the records they would have realised that Dr Rozanah's testimony before the DAC was different from what was said to the IIC but this point did not come out at the proceedings before the DAC. The contradiction should perhaps have been explained. But this was not done. At any rate, the respondents accept that what she said before the DAC favoured the appellant. But they maintain that her testimony touches on the 'merits' and is therefore 'irrelevant'. This is completely untenable. Since the witness, a former legal advisor had testified in the appellant's favour, the DAC cannot then 'cherry-pick' and rely only on evidence that implicates the appellant and ignore evidence that speaks in his favour. If that is what they did, then it was plainly unfair to the appellant;

(e) the conduct of the DAC which gave no reasons for rejecting Dr Rozanah's testimony is baffling to say the least. The DAC cannot seek refuge under the guise of being under no positive duty to give reasons;

(f) we accept that the right to cross-examine is not automatic and it all depends on the facts and circumstances of each case. We agree that the disciplinary proceedings are not expected to be conducted with all the trappings and formalities of a trial in a court of law. Thus, the disciplinary proceedings could well be based just on written representations and documents. However, since the DAC had decided to call several witnesses, it follows as a matter of pure logic and common sense and indeed, a matter of elementary fairness, that the appellant should have been present when evidence was taken from witnesses who testified for, or against him, and he should have been given a right of cross-examination. At the very least, the appellant should have been given the opportunity to articulate a response to rebut or contradict what

the witnesses had said. The fact that the appellant did not ask to be present or seek to cross-examine the witnesses, does not amount to a waiver. Indeed, if there is a fundamental flaw in the procedure, waiver does not even apply (*Mayes v Mayes*);

(g) here, the fact that evidence of witnesses was taken in the absence of the appellant amounts to, or can be regarded as evidence that was taken 'behind the back' of the appellant and this egregiously violates the *audi alteram partem* component of the rules of natural justice. There is no evidence that the appellant was even informed (even in gist) as to what each of the witnesses had said in his absence. Thus, he had no opportunity of seeking clarification, rebutting or contradicting the evidence which was taken behind his back (*Kanda*'s case);

(h) in light of all that had transpired before the DAC and the very fundamental violation of the *audi alteram partem* component of the rules of natural justice, it follows that any earlier defect (if any) in the disciplinary process (ie IIC, IC and DC) remains extant and was not 'cured' by the DAC's appellate proceedings, which rather unfortunately was not conducted fairly. Indeed, if it was conducted fairly, the appellant would have had the chance to clarify, rebut or contradict the evidence and he may well have exculpated himself by convincing the DAC that he was not guilty of insubordination (*John v Rees*);

(i) clearly in this case, the DAC had committed a fundamental procedural misstep by interviewing or questioning witnesses without the appellant being present and thereby not affording him the right to clarify, rebut, or contradict what the witnesses had said to the DAC. Hence, we would regard this as a manifestation of procedural impropriety as envisaged by Lord Diplock in *CCSU* at p 411; and

(j) in the result, we are compelled to state that the DAC as the final appellate disciplinary body of UPM, whilst acting completely honestly and in a bona fide manner and actuated by the best of intentions, had regrettably failed in their basic duty to afford the appellant procedural fairness as per the provisions of the Act and as postulated in *Rohana*'s case, thereby vitiating the integrity of the DAC's appeal process. Thus, for the several reasons discussed as above, we are satisfied that the DAC decision suffered from error of law which warrants curial intervention by way of judicial review.

THE OUTCOME

[108] For the reasons discussed above, the appeal is allowed and the order of the High Court dated 11 June 2021 is set aside. Consequently, it follows that the appellant's judicial review succeeds and is hereby allowed and we make the following orders:

(a) an order and/or direction of the nature of certiorari under para 1 of the Schedule to the Courts of Judicature Act 1964 to quash the decision of the Disciplinary Appeals Committee dated 23 July 2019;

(b) a declaration that the appellant's reduction of rank from Grade VK6 to VK7 was without basis; and

(c) consequentially, we hereby o that the appellant be reinstated to the position of Grade VK6, such reinstatement to take effect from 9 October 2018 without any loss of benefit and UPM is to accordingly calculate the amount which is due to the appellant ('the amount payable') and the amount payable shall be paid to the appellant (*together with interest thereupon calculated at 5%pa from 9 October 2018 until the date of full payment or realisation*) within three months of service of the sealed order of this court on Messrs Zain & Co, the solicitors acting for the respondents.

COSTS

[109] We order the first respondent ('UPM') to pay costs to the appellant in the sum of *RM25,000* (subject to allocatur) as costs here and below. We make no order as to costs against the second respondent ('DAC') and the third respondent.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh